Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1998

AMERICAN BLIND & WALLPAPER FACTORY, INC.,

Petitioner,

vs.

ALVORD POLK, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Court of Appeals for the Third Circuit's decision in this case presents an important issue as to whether the court of appeals so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power:

> Whether a district court, without ever holding a hearing to consider the evidence, can summarily enforce a settlement agreement against a party which never agreed to or executed the agreement and disputes that it is bound by the settlement, when there are genuine issues of material fact relating to the enforcement of the settlement and relating to an underlying litigation agreement among plaintiffs?

The Third Circuit's resolution of this issue is in direct conflict with its own decisions, and with the decisions of the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and D.C. Circuits.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties identified in the caption, the respondents include: Fairman Wallpaper and Paint Company, now known as Fairman Wall and Window Coverings, Frank R. Yocum t/a Frank R. Yocum & Sons Wallpaper Co., Harry's Wallpaper, Inc., Lancaster Carpet Mart, Inc., Marvin Kolsky t/a Headquarters Windows & Walls, Silver Wallpaper & Paint Co., Inc., now known as Silver Wallcoverings, Yankee Wallcoverings, Inc. and F. Schumacher & Co.

Pursuant to Supreme Court Rule 29.6, petitioner declares that it has no parent companies and no subsidiaries.

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Appendix I — Report And Recommendation Of The United States Magistrate Judge To The District Court For The Eastern District Of Pennsylvania Filed January 10, 1997 ..... 57a

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American Blind & Wallpaper Factory, Inc. ("ABWF") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 5a-13a) is unreported. The opinion of the district court (App., *infra*, 22a-28a) is also unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 18, 1998. App., *infra*, 3a-4a. The timely petition for rehearing with suggestion for rehearing *in banc* was denied on July 23, 1998. *Id.* at 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The judgment of the court of appeals which is the subject of this petition for a writ of certiorari does not involve any statute. The underlying antitrust case involved claims asserted under Section 1 of the Sherman Act, 15 U.S.C. § 1.

STATEMENT OF THE CASE

A. Introduction.

This case involves a grave and manifest injustice which can now only be remedied by this Court. The court of appeals, in direct contravention of its own controlling precedent and precedent of other circuits, affirmed the district court's summary enforcement of a settlement agreement to which

ABWF never agreed and never executed, without ever holding a hearing to consider relevant evidence, even though there are genuine issues of material fact as to whether ABWF was bound by the agreement. As a result, ABWF will be forced to dismiss seven years of litigation with prejudice and forever forego an antitrust claim in excess of $56 million without ever having the opportunity to be heard and present evidence on the disputed issues of fact relating to the enforceability of the settlement.

B. Factual Background.

ABWF is one of nine plaintiffs in this antitrust litigation against defendants F. Schumacher & Co. ("Schumacher") and the National Decorating Products Association, Inc. (the "NDPA").[1] For over a decade, retailers who marketed wallpaper by providing sample books and showroom displays have feuded with dealers who sell at a discount through toll free "1-800" telephone numbers. CA App. 202-204. As a result of pressure from the NDPA (the retail wallcoverings trade organization), Schumacher began to refuse to sell its products to certain "1-800" dealers, including the plaintiffs in this litigation.

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1. There were originally ten plaintiffs, but one of the plaintiffs, Delta Paint and Wallpaper Supply Co., Inc. has chosen to forego its claims and is not participating in this litigation. The original ten plaintiffs are Alvord-Polk, Inc., American Blind Factory, Inc., now known as American Blind and Wallpaper Factory, Inc., Delta Paint and Wallpaper Supply Co., Inc., Fairman Wallpaper and Paint Company, now known as Fairman Wall and Window Coverings, Frank R. Yocum t/a Frank R. Yocum & Sons Wallpaper Co., Harry's Wallpaper, Inc., Lancaster Carpet Mart, Inc., Marvin Kolsky t/a Headquarters Windows & Walls, Silver Wallpaper & Paint Co., Inc., now known as Silver Wallcoverings, and Yankee Wallcoverings, Inc. CA App. 203. Since this petition for a writ of certiorari relates to a dispute between ABWF and the other plaintiffs in the underlying action, for ease of reference, ABWF will refer to respondents collectively as "the other plaintiffs" or "the other eight plaintiffs".

CA App. 204. Accordingly, plaintiffs retained the law firm of Kohn Swift & Graf, P.C. (the "Kohn firm")[2] to initiate a lawsuit against Schumacher and the NDPA. *Id.*

Prior to the inception of the litigation in 1990, all of the plaintiffs entered into the Wallpaper Industry Litigation Committee Agreement (the "Litigation Agreement"). CA App. 204-205. The Litigation Agreement is a confidential written agreement which governs the relationship between and among the plaintiffs with regard to the prosecution of the Schumacher Litigation. CA App. 204-205; 216-225; 236-237.

The Litigation Agreement provides that decisions regarding the governance of the Schumacher Litigation are determined by a majority vote of the plaintiffs (¶ 5). CA App. 205; 218-219; 238. The Litigation Agreement also provides, however, that any plaintiff may "withdraw as a litigant" at any time (¶ 6) (CA App. 219); and each plaintiff is free to enter into separate settlement agreements with one or all defendants (¶ 10) (CA App. 221). The decision to accept a settlement tendered by a defendant to all signatories as a group is governed by a majority vote of the plaintiffs (¶ 11) (CA App. 221), unless that plaintiff had withdrawn from the plaintiff group pursuant to paragraph 6. Where the plaintiff group enters into a monetary settlement with any defendant (and none of the plaintiffs have withdrawn), the net proceeds are to be distributed equally to all plaintiffs who have not withdrawn (¶ 12) (CA App. 221-222). The Litigation Agreement also contains other important terms, including confidentiality and notice provisions. *Id.*

At the beginning of the Schumacher Litigation in 1990, all of the plaintiffs were retailers of wallcoverings with retail stores and also sold wallpaper to customers across the country over

2. At the time this action was commenced in 1990, the Kohn firm was named Kohn, Savett, Klein & Graf, P.C.

800 numbers. CA App. 203. The primary purpose for initiating the lawsuit was twofold: first, to force Schumacher to sell its entire product line to plaintiffs, and, second, to discourage other manufacturers from refusing to sell their products to 800 number dealers. CA App. 204.

In the seven years that elapsed since the lawsuit was initiated, and since the Litigation Agreement was signed, circumstances that bear directly upon the purpose of the lawsuit changed dramatically. CA App. 205-211. Some of the plaintiffs have become bankrupt or have gone out of business. CA App. 205-207. Others are no longer in the 800 number business and only have traditional retail stores. *Id.*

ABWF, on the other hand, no longer has retail stores and is solely dependent on its 800 number business. CA App. 206-207. Nevertheless, it has suffered significant losses as a result of defendants' conduct. CA App. 205-206. Indeed, as of June 30, 1995, plaintiffs' damages expert calculated ABWF's damages claim as in excess of $56 million. *Id.*

ABWF's claim represents 54.25% of the total damages sustained by all plaintiffs. CA App. 205-206. It is more than the combined total of all of the other plaintiffs' claims. *Id.* In fact, one of the plaintiffs, Heap, has sustained zero damages, even as calculated by plaintiffs' own expert. *Id.*[3] Accordingly, by July, 1995, a year before the first trial, it became apparent to all plaintiffs that the provisions in the Litigation Agreement governing a group vote for purposes of settlement were no longer fair or appropriate.

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3. If this Court were to adopt the other plaintiffs' position, Heap would share 1/9 of any monetary settlement (approximately $833,333 before the deduction of attorney's fees and costs) when, in fact, he sustained no damages.

Consequently, on July 17, 1995, ABWF advised the Kohn firm that ABWF had withdrawn as a litigant and from the plaintiff group. CA App. 206; 227-228; 238; 277-278. Thereafter, all plaintiffs prepared for trial, and the case was tried before a jury (including ABWF's claims) from April 29, 1996 to June 14, 1996. CA App. 51-57. However, after a lengthy trial and extensive jury deliberations, the jury hung, and Judge Huyett declared a mistrial. CA App. 56. The case was reassigned to the Honorable Thomas N. O'Neill, Jr. for retrial. CA App. 58.

On August 8 and 10, 1996, ABWF advised the Kohn firm in writing that the Kohn firm was not authorized to discuss any group settlement which included a resolution of ABWF's claims. CA App. 207; 230-231. Moreover, from July, 1995 to the present, ABWF's personal attorneys repeatedly advised the Kohn firm and the other plaintiffs in writing and orally that ABWF had withdrawn as a litigant for purposes of settlement. CA App. 240-242; 244-246; 250-251; 255-259; 261-262. ABWF, both directly and through its personal attorneys, also repeatedly advised the Kohn firm, the other plaintiffs, and later, Schumacher, that the Kohn firm did not have the authority to negotiate or pursue a group settlement on behalf of ABWF. *Id.*; CA App. 206-208; 211.

On August 22, 1996, Schumacher's attorneys sent two settlement proposals to the Kohn firm. CA App. 248-250. The second settlement proposal made by Schumacher's attorneys contained different material monetary terms which had been negotiated by the Kohn firm despite ABWF's clear instructions that the Kohn firm was not authorized to negotiate or agree to a settlement on ABWF's behalf. CA App. 242; 248-251. Moreover, the Kohn firm negotiated the different monetary terms in the second settlement proposal without disclosing the

first proposal to ABWF.[4] CA App. 248-251. The August 22, 1996 settlement proposals were rejected by ABWF. *Id.*

On September 24, 1996, at the direction of Judge O'Neill, United States Magistrate Judge Tullio Gene Leomporra held a settlement conference. CA App. 253-254. The principals and attorneys of Schumacher were present, as were the principals of all of the plaintiffs, trial counsel for all plaintiffs, and ABWF's personal counsel. CA App. 253-254. After extensive settlement discussions, Schumacher and ABWF could not reach a settlement. CA App. 254.

Thereafter, one of the other plaintiffs requested a meeting of all plaintiffs and plaintiffs' counsel with the magistrate judge privately. CA App. 254. The plaintiffs agreed to meet. *Id.* After some discussion among the plaintiffs, one of the plaintiffs stated that they should vote to accept Schumacher's settlement proposal. CA App. 255. ABWF, through its attorneys, advised the plaintiffs that if they intended to vote, ABWF would advise Schumacher that the Kohn firm had no authority to negotiate on behalf of ABWF; and, ABWF rejected the settlement offer dated August 22, 1996. CA App. 255. Minutes later, the other plaintiffs called for a vote over ABWF's objection. *Id.* Neither ABWF nor its personal attorneys were ever given advance notice of the vote to accept the settlement, as required by the Litigation Agreement. CA App. 211; 264. The other plaintiffs voted to accept the settlement. *Id.*

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4. The Kohn firm's undisclosed negotiation of payment terms in Schumacher's proposals, in direct contravention of ABWF's express instructions, was particularly egregious because ABWF had always instructed the Kohn firm that ABWF's primary goal was to obtain access to Schumacher's product, not a monetary settlement. CA App. 208-209; 240.

C. Proceedings In The District Court.

The proceedings in the district court which give rise to this petition for a writ of certiorari relate to a motion to enforce a settlement against ABWF filed by the other plaintiffs, which was granted by the district court. Before the motion to enforce settlement was filed, the parties had been engaged in extensive litigation for six years, and the case was set to be retried to a jury.[5]

On October 31, 1996, the district court entered an order that any party wishing to assert that the case has been settled

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5. On May 25, 1990, plaintiffs initiated this action in the United States District Court for the Eastern District of Pennsylvania, and on January 9, 1991, plaintiffs filed an amended complaint asserting various claims against Schumacher and the NDPA, including claims that Schumacher and NDPA conspired in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. CA App. 67-97. Defendants moved for summary judgment. The district court, per the Honorable Daniel H. Huyett, III, entered summary judgment in favor of defendants, dismissing plaintiffs' claims. *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 1992 WL 59096 (E.D. PA, Mar. 19, 1992) (No. Civ. A. 90-3617). Plaintiffs appealed to the United States Court of Appeals for the Third Circuit, which initially affirmed Judge Huyett's decision. *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 999 (3d Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995). After rehearing, the court of appeals reversed Judge Huyett's grant of summary judgment in part and affirmed in part. *Id.* The case was remanded to Judge Huyett for disposition of the two remaining federal antitrust claims — (1) whether the NDPA entered into a contract, combination or conspiracy with Schumacher in violation of Section 1 of the Sherman Act; and, (2) whether Schumacher entered into a contract, combination or conspiracy with the NDPA in violation of Section 1 of the Sherman Act. *Id.* The case was tried before a jury from April 29, 1996 to June 14, 1996. CA App. 51-57. From June 14 through June 24, 1996, the jury deliberated. CA App. 51-57. After an almost eight-week trial, the jury hung, and Judge Huyett declared a mistrial. CA App. 56. The case was reassigned to the Honorable Thomas N. O'Neill, Jr. for retrial. CA App. 58.

should file a motion to enforce settlement by November 12, 1996.[6] CA App. 105. On November 22, 1996, the other eight plaintiffs filed a motion to enforce settlement with the district court. CA App. 106. On December 3, 1996, the district court entered an order referring the motion to enforce settlement to United States Magistrate Judge Leomporra for report and recommendation. CA App. 59; 105. On December 10, 1996, Schumacher, a defendant in the underlying antitrust case, filed a memorandum of law in support of the other eight plaintiffs' motion to enforce settlement. CA App. 148.

On December 13, 1996, ABWF filed a response, memorandum of law and voluminous 340 page appendix of exhibits in opposition to the motion to enforce settlement. CA App. 156-537. ABWF also filed, on December 17, 1996, a response in opposition to Schumacher's memorandum in support of the motion to enforce settlement, and a supplemental appendix of exhibits. CA App. 538-555.

United States Magistrate Judge Leomporra scheduled oral argument on the motion to enforce settlement on December 17, 1996. App., *infra*, 61a-89a. However, in contravention of the district court's November 26, 1996 order sealing the record which provided that counsel for defendants (Schumacher and the NDPA) should not receive copies of any of the pleadings or briefs relating to the motion to enforce settlement, Magistrate Judge Leomporra permitted the principals and attorneys of defendants in the underlying antitrust case to attend the oral argument, over the objections of the attorneys for ABWF and trial counsel for all plaintiffs. *Id.* Indeed, the majority of the proceeding before the magistrate judge related to arguments over who should be permitted to attend. *Id.* As a result, to avoid disclosing confidential and privileged information which had

6. The November 12, 1996 deadline was extended until November 22, 1996 by the district court. CA App. 59.

been filed under seal, and to avoid breaching the confidentiality provision in the Litigation Agreement, ABWF was constrained to rely upon its brief and argue only in very general terms, and was not permitted to refer to specific record evidence. *Id.* Moreover, the magistrate judge did not conduct an evidentiary hearing. *Id.* Thus, ABWF was deprived of an opportunity to present evidence concerning the disputed issues of fact relating to the Litigation Agreement and whether the other plaintiffs could bind ABWF to the settlement agreement.

On January 13, 1997, United States Magistrate Judge Leomporra issued a report and recommendation (dated January 10, 1997) in which he recommended that the motion to enforce settlement be granted. App., *infra*, 57a-60a. ABWF filed objections to the report and recommendation on January 21, 1997. CA App. 635-690. The district court scheduled a hearing and oral argument for February 13, 1997 on the motion to enforce settlement. CA App. 61. ABWF attended with witnesses who were prepared to testify, including the President of ABWF, who had traveled from Michigan. App., *infra*, 29a-56a. Again, principals and attorneys of Schumacher and the NDPA were present. *Id.* As a result, the district court limited the argument to whether the proceedings should be open or closed to the defendants, and did not hear testimony or argument on the merits of the motion to enforce. *Id.* After extensive briefing over a several month period on the issue of whether the proceedings relating to the dispute among plaintiffs should be closed to defendants and their counsel, and without an evidentiary hearing or oral argument on the merits, the district court issued a memorandum and order on July 8, 1997 approving the report and recommendation of the magistrate judge, and granting the motion to enforce settlement against ABWF. App., *infra*, 20a-28a; 49a-56a. On July 30, 1997, the district court entered a final judgment pursuant to Federal Rule of Civil Procedure 54(b) that ABWF is bound by the settlement agreement entered into by the other eight plaintiffs and Schumacher. App., *infra*, 14a-19a.

D. Proceedings In The Court Of Appeals.

ABWF timely filed its notice of appeal of the judgment of the district court on August 7, 1997. CA App. 1-3. After briefing and oral argument on May 8, 1998, the court of appeals affirmed the judgment of the district court on June 18, 1998. App., *infra*, 3a-13a. ABWF timely filed a petition for rehearing with suggestion for rehearing *in banc* which was denied on July 23, 1998. *Id.* at 1a-2a.

REASONS FOR GRANTING THE PETITION

I.

THE COURTS BELOW SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The controlling precedent of the Third Circuit mandates that the district court was required to hold a hearing before deciding the other eight plaintiffs' motion to enforce settlement. *See Tiernan v. Devoe*, 923 F.2d 1024 (3d Cir. 1991) and *Garabedian v. Allstates Engineering Co.*, 811 F.2d 802 (3d Cir. 1987). The court of appeals' decision fails to address *Tiernan* and *Garabedian*, much less follow the rule in those cases that the district court's failure to hear testimony or argument from ABWF on the motion to enforce settlement requires reversal and remand.[7]

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7. Significantly, in their appellate brief, the other eight plaintiffs did not dispute that the district court did not hold a hearing and failed to hear testimony or argument from ABWF on the motion to enforce settlement. CA App. 764-792. Similarly, the other eight plaintiffs did not dispute that ABWF was denied a hearing by the United States Magistrate Judge. *Id.* However, the court of appeals failed to consider or address this issue in its decision. App., *infra*, 3a-13a.

In *Garabedian*, plaintiff filed a wrongful discharge action against defendants. 811 F.2d at 803. The parties subsequently engaged in settlement discussions. *Id.* Plaintiff's attorney contended that plaintiff agreed to settle his claims "in principle." *Id.* Accordingly, the attorney informed the district court and opposing counsel that the parties had reached an agreement. *Id.* The district court entered an order dismissing the case as settled in accordance with Rule 23(b) of the Local Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania. *Id.*

Thereafter, counsel for defendants drafted a settlement agreement which purportedly reflected the proposed agreement. *Id.* When plaintiff saw the draft, he stated that he had not and would not agree to settle on those terms. *Id.* The district court ordered the parties to submit memoranda with supporting affidavits regarding whether the order should be vacated. *Id.* Defendants and plaintiff's attorney filed responses indicating that the case had been settled on the terms set forth in the proposed agreement. *Id.* Plaintiff filed an affidavit and memorandum contending that he had not authorized settlement on those terms. *Id.* Without conducting a hearing, the district court determined that the case was settled and denied plaintiff's motion to vacate. *Id.*

On appeal, the Third Circuit held that the district court erred in resolving the dispute without holding a hearing, and by relying solely on affidavits and memoranda. *Id.* The Third Circuit stated:

> [T]his Court has made clear that when relief from a judgment hinges upon a factual issue and credibility determinations are involved, a hearing should be held to determine entitlement to relief. [Citation omitted.] We believe this principle applies in the present context.

> Because the affidavits of Garabedian and Di Pietro demonstrate the existence of a genuine issue of material fact, we believe the district court erred in resolving the matter in summary fashion. The district court should have held a hearing to determine whether Garabedian had indeed authorized Di Pietro to settle on the terms set forth in the proposed settlement agreement.

Garabedian, 811 F.2d at 803-804.

Similarly, in *Tiernan*, the Third Circuit vacated an order of the district court granting summary enforcement of several settlement agreements. In so doing, the Court emphasized that:

> [The] central issue — whether there was any disputed issue of material fact as to the validity of the settlement agreements — is similar to that which any court must address when ruling on a motion for summary judgment. [Citation omitted.] This is not a mere coincidence. ***The stakes in summary enforcement of a settlement agreement and summary judgment on the merits of a claim are roughly the same — both deprive a party of his right to be heard in the litigation.***

Tiernan, 923 F.2d at 1031 (emphasis added).[8]

The Third Circuit in *Tiernan* held that, as a result of material disputes raised by plaintiffs regarding the authority of their attorneys to enter into a settlement agreement (substantially similar to ABWF's position here), the district

8. Indeed, the other eight plaintiffs conceded in their appellate brief that they "do not disagree with ABWF's conclusion that the matter is in the nature of a motion for summary judgment and that it is therefore subject to plenary review." CA Brief for Appellees at 13.

court's summary enforcement of the settlement agreements was inappropriate and deprived plaintiffs of their right to be heard in the litigation. *Tiernan*, 923 F.2d at 1038. Accordingly, the Third Circuit vacated the order of the district court. *Id.*

In this case, the court of appeals failed to reverse the judgment of the district court, even though ABWF was deprived of its right to a hearing and the opportunity to present evidence on material facts relating to enforcement of the settlement agreement. App., *infra*, 3a-13a; 29a-56a. Thus, the court of appeals failed to follow its own controlling precedent in *Tiernan* and *Garabedian*. Therefore, the courts below so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

ABWF believed at all times, as was initially contemplated by the district court, that ABWF would be permitted to present testimony and other evidence relating to ABWF's position on the merits of the motion to enforce the settlement. App., *infra*, 29a-56a. ABWF's President, Steven Katzman, flew in from Michigan to attend the hearing which had been scheduled by the district court, with the expectation that he would be permitted to testify on issues relevant to ABWF's position. *Id.* Mr. Katzman expected to testify that ABWF was not bound by the other eight plaintiffs' settlement with defendant Schumacher, that the Kohn firm did not have authority to settle the case on behalf of ABWF, that the other plaintiffs materially breached the Litigation Agreement which rendered the agreement unenforceable and prejudiced ABWF, and that ABWF was not given advance or proper notice, in accordance with the Litigation Agreement, of the purported vote of the other eight plaintiffs. ABWF's personal counsel was also present and prepared to testify.[9] The district court, however,

9. Similarly, the other eight plaintiffs conceded in their appellate brief that

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spent the entire proceeding hearing argument on whether the hearing should be open or closed to defendants, and whether principals and attorneys of defendants should be permitted to attend the hearing. *Id.*

The district court established a briefing schedule limited to the issue of whether the hearing on the motion to enforce settlement (which related solely to determining whether the other plaintiffs could bind ABWF to the settlement and force the dismissal of ABWF's $56 million claim) should be open or closed, and whether principals and attorneys of defendants in the underlying antitrust action should be permitted to attend the hearing. App., *infra*, 49a-54a. At great expense, ABWF complied with the briefing schedule and submitted briefs on these issues. CA App. 793-825; 843-857. Thereafter, without ever ruling on the issue of whether the hearing should be open or closed, and whether principals and attorneys of defendants should be permitted to attend the hearing, without ever conducting any evidentiary hearing, and without even entertaining any oral argument on the merits of the motion to enforce settlement, the district court issued its memorandum and order approving the report and recommendation of the magistrate judge, and granting the motion to enforce settlement. App., *infra*, 20a-28a. ABWF was thus deprived of its right to be heard in the litigation.

ABWF filed of record substantial evidence which, at a minimum, created numerous issues of material fact as to

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(Cont'd)

> [w]ith regard to the hearing and oral argument scheduled for February 13, 1997, the settling plaintiffs attended that proceeding with witnesses who were prepared to testify. [CA App.] 764-791. However, the court did not hear any testimony. [CA App.] 764-791.

CA Brief for Appellees at 4.

whether ABWF could be bound by the settlement between the other eight plaintiffs and Schumacher. CA App. 156-555. Significantly, the other eight plaintiffs did not submit any affidavits or other evidence (other than the Litigation Agreement and the purported settlement agreement with Schumacher) to contradict ABWF's evidence. CA App. 58-66. The following are some of the issues of material fact which should have been resolved at a hearing:

1. Whether ABWF withdrew as a litigant pursuant to the Litigation Agreement? CA Brief for Appellant at 12; 22-24; 26-35.

2. Whether the other plaintiffs and trial counsel for all plaintiffs violated a binding resolution dividing plaintiffs into two groups for settlement? *Id.* at 13-14; 37.

3. Whether the other plaintiffs or trial counsel for all plaintiffs breached representations made to ABWF that they would not invoke the majority vote provisions in the Litigation Agreement to allow ABWF to exercise its right to settle separately pursuant to the Litigation Agreement? *Id.* at 41-44.

4. Whether trial counsel for plaintiffs had authority to settle ABWF's claims and whether trial counsel's actions prejudiced ABWF? *Id.* at 41-44.

5. Whether ABWF was given advance and proper notice of the September 24, 1996 vote of the other eight plaintiffs to accept Schumacher's settlement offer, as required by the Litigation Agreement? *Id.* at 14-16; 35-36.

6. Whether there was a material change in circumstances among the plaintiffs to render the majority vote provision in the Litigation Agreement unenforceable? *Id.* at 10-12; 37-41.

7. Whether the other plaintiffs breached the confidentiality provision in the Litigation Agreement and whether such a breach rendered the Litigation Agreement unenforceable and/or prejudiced ABWF in its ability to settle separately with Schumacher? *Id.* at 44-47.

Nevertheless, the district court deprived ABWF of an evidentiary hearing and oral argument on the merits when the court summarily enforced the agreement against ABWF, forcing ABWF to forego its $56 million claim. App., *infra*, 14a-28a. In reaching its decision, the district court, without holding a hearing to consider the evidence, made incorrect factual determinations which were adverse to ABWF. App., *infra*, 20a-28a. Accordingly, the proceedings in the district court, including the proceedings before the magistrate judge, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Rather than correcting the district court's errors, as required by its own decisions in *Tiernan* and *Garabedian*, the court of appeals affirmed the judgment of the district court in a terse, unpublished per curium opinion which did not even mention *Tiernan* or *Garabedian*. App., *infra*, 5a-13a. Moreover, the court of appeals did not follow the law of the Third Circuit as set forth in *Tiernan* and *Garabedian*. App., *infra*, 5a-13a. Further, the court of appeals relied upon and affirmed incorrect factual determinations made by the district court, even though ABWF argued vigorously on appeal that the district court's factual determinations were erroneous and were made without a hearing and without considering uncontradicted evidence submitted by ABWF. App., *infra*, 11a. As a result, the court of appeals so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the district court, as to call for an exercise of this Court's supervisory power.

The result of the defective proceedings in the lower courts and concomitant dismissal of ABWF's $56 million antitrust claim is manifestly unfair and unjust. This drastic result will occur without any court ever holding any hearing or considering any of the substantial evidence submitted by ABWF, unless this Court grants the petition for a writ of certiorari and remands the case for a hearing. This is truly a case where this Court should exercise its supervisory powers, to prevent a fundamentally unfair result, and to maintain the public's faith in the federal court system.

II.

THE DECISION BELOW DIRECTLY CONFLICTS WITH THE LAW OF OTHER CIRCUITS.

The judgment of the court of appeals directly conflicts with the law of the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and D.C. Circuits. The United States Courts of Appeals for the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and D.C. Circuits have all held that the summary enforcement of a settlement agreement by a district court is inappropriate when there are genuine issues of material fact.

Each of these circuits recognizes the fundamental principal of allowing a party the right to be heard, when there are disputed issues relating to the validity, existence or terms of a settlement agreement, before the agreement is enforced and rights are irrevocably lost. *See Alexander v. Industries of the Blind, Inc.*, 901 F.2d 40 (4th Cir. 1990) (plenary evidentiary hearing required to determine motion to enforce oral settlement); *Petty v. Timken Corp.*, 849 F.2d 130 (4th Cir. 1988) (summary enforcement of settlement agreement is inappropriate when there is material dispute about existence of settlement agreement or authority of attorney to enter into settlement

agreement of behalf of his client); *Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F.2d 599 (5th Cir. 1986) (district court must hold hearing on disputed issues involving validity and scope of agreement which purported to release or settle claims of several seamen and their family members); *Mid-South Towing Co. v. Har-Win, Inc.*, 733 F.2d 386 (5th Cir. 1984) (although district court has inherent power to enforce summarily agreement to settle case pending before it, parties must be allowed evidentiary hearing on disputed issues relating to validity and scope of settlement agreement, when one party's opposition to enforcement of settlement agreement is based on challenge to validity of agreement itself); *Bamerilease Capital Corp. v. Nearburg*, 958 F.2d 150, 153 (6th Cir.), *cert. denied*, 506 U.S. 867 (1992) (courts have power to summarily enforce settlement agreements, but evidentiary hearing should be held when substantial factual dispute exists); *MIF Realty L.P. v. Rochester Associates*, 92 F.3d 752 (8th Cir. 1996), (as general rule, when parties dispute existence or terms of settlement agreement, parties must be allowed evidentiary hearing by district court); *Sheng v. Starkey Laboratories, Inc.*, 53 F.3d 192 (8th Cir. 1995), *appeal after remand*, 117 F.3d 752 (8th Cir. 1997) (generally, when parties dispute existence or terms of settlement agreement, parties must be allowed evidentiary hearing); *Gatz v. Southwest Bank of Omaha*, 836 F.2d 1089 (8th Cir. 1988) (district court must hold evidentiary hearing when there is substantial factual dispute concerning existence or terms of settlement agreement, or when dispute presents complicated factual issues); *In re City Equities Anaheim, Ltd.*, 22 F.3d 954 (9th Cir. 1994), (district court had no discretion to summarily enforce settlement when material facts are in dispute; rather, district court is required to hold evidentiary hearing to resolve such issues); *Callie v. Near*, 829 F.2d 888 (9th Cir. 1987), *appeal after remand*, 895 F.2d 1416 (9th Cir. 1990) (although district court has equitable power to summarily enforce settlement agreements, parties have to be allowed

evidentiary hearing where material facts concerning existence or terms of agreement to settle are in dispute); *Russell v. Puget Sound Tug & Barge Co.*, 737 F.2d 1510 (9th Cir. 1984) (summary enforcement of settlement is ill-suited to situations presenting complex factual issues related either to formation or consummation of settlement contract, which only testimonial exploration in more plenary proceeding is apt to satisfactorily resolve); *United States v. Hardage*, 982 F.2d 1491 (10th Cir. 1993), *on remand*, 1994 WL 159410 (W.D. Okla. 1994), *affirmed*, 53 F.3d 343 (10th Cir. 1995), *cert. denied*, 516 U.S. 1009 (1995) (where material facts concerning existence or terms of agreement to settle are in dispute, parties must be allowed evidentiary hearing); *Autera v. Robinson*, 419 F.2d 1197, 1198 (D.C. Cir. 1969) (reversing order enforcing disputed settlement agreement without hearing).

This Court should grant the petition for a writ of certiorari to resolve the conflict between the Third Circuit's judgment in this case, and the decisions of the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and D.C. Circuits. The Third Circuit's explicit sanction of the district court's summary enforcement of a settlement agreement, without an evidentiary hearing, directly conflicts with the law of other circuits. This Court's review is needed to resolve this split of authority and to restore uniform nationwide application of federal court procedure relating to a critical issue — which potentially affects all litigants in federal court — relating to when a disputed settlement can be enforced against a party.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM C. REICH
Counsel of Record
STEPHANIE RESNICK
THEODORE H. JOBES
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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING SUR PETITION FOR REHEARING DATED JULY 23, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1609

ALVORD-POLK, INC.; AMERICAN BLIND FACTORY, INC.; DELTA PAINT AND WALLPAPER SUPPLY CO., INC.; FAIRMAN WALLPAPER AND PAINT COMPANY; FRANK R. YOCUM, t/a FRANK R. YOCUM & SONS WALLPAPER CO.; HARRY'S WALLPAPER, INC.; LANCASTER CARPET MART, INC.; MARVIN KOLSKY, t/a HEADQUARTERS WINDOWS & WALLS; SILVER WALLPAPER & PAINT CO., INC.; YANKEE WALLCOVERINGS, YANKEE WALLCOVERINGS, INC.

v.

F. SCHUMACHER & CO.; THE NATIONAL DECORATING PRODUCTS ASSOCIATION, INC.

American Blind Factory, Inc.,

Appellant

(D.C. Civ. No. 90-cv-03617)

SUR PETITION FOR REHEARING

Appendix A

Present: BECKER, *Chief Judge*, SLOVITER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, RENDELL and BRIGHT*, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

s/ [illegible]

Dated: JUL 23 1998

DR/CC: AACR
SR
WHE
JHK

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* Honorable Myron H. Bright, United States Circuit Judge for the Eighth Judicial Circuit, who sat by designation, as to panel rehearing only.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JUNE 18, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 97-1609 & 97-1610

ALVORD-POLK, INC.; AMERICAN BLIND FACTORY, INC.; DELTA PAINT AND WALLPAPER SUPPLY CO., INC.; FAIRMAN WALLPAPER AND PAINT COMPANY; FRANK R. YOCUM, t/a FRANK R. YOCUM & SONS WALLPAPER CO.; HARRY'S WALLPAPER, INC.; LANCASTER CARPET MART, INC.; MARVIN KOLSKY, t/a HEADQUARTERS WINDOWS & WALLS; SILVER WALLPAPER & PAINT CO., INC.; YANKEE WALLCOVERINGS, YANKEE WALLCOVERINGS, INC.

v.

F. SCHUMACHER & CO.; THE NATIONAL DECORATING PRODUCTS ASSOCIATION, INC.

American Blind Factory, Inc.,
Appellant in 97-1609

F. Schumacher & Co.,
Appellant in 97-1610

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil Action No. 90-cv-03617

Appendix B

Present: Scirica, Cowen and Bright*, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on May 8, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 30, 1997, be, and the same is hereby affirmed in part and reversed in part and the cause is remanded to the District Court for proceedings consistent with this opinion. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ [illegible]
Acting Clerk

Dated: 18 June 1998

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* The Honorable Myron H. Bright, United States Circuit Judge for the Eighth Judicial Circuit, sitting by designation.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JUNE 16, 1998

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 97-1609 & 97-1610

ALVORD-POLK, INC.; AMERICAN BLIND FACTORY, INC.; DELTA PAINT AND WALLPAPER SUPPLY CO., INC.; FAIRMAN WALLPAPER AND PAINT COMPANY; FRANK R. YOCUM, t/a FRANK R. YOCUM & SONS WALLPAPER CO.; HARRY'S WALLPAPER, INC.; LANCASTER CARPET MART, INC.; MARVIN KOLSKY, t/a HEADQUARTERS WINDOWS & WALLS; SILVER WALLPAPER & PAINT CO., INC.; YANKEE WALLCOVERINGS, YANKEE WALLCOVERINGS, INC.

v.

F. SCHUMACHER & CO.; THE NATIONAL DECORATING PRODUCTS ASSOCIATION, INC.

American Blind Factory, Inc.,
Appellant at 97-1609

F. Schumacher & Co.,
Appellant at 97-1610

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil Action No. 90-cv-03617
(Honorable Thomas N. O'Neill, Jr.)

Appendix C

Argued May 8, 1998

Before: SCIRICA, COWEN and BRIGHT*, *Circuit Judges*

(Filed JUNE 18 1998)

OPINION OF THE COURT

PER CURIAM.

American Blind and Wallpaper Factory, Inc., one of nine plaintiffs in all antitrust suit against defendant F. Schumacher Co., appeals the judgment of the district court binding it to a litigation agreement it signed with the eight other plaintiffs. Tile district court held that under the litigation agreement, American Blind was obligated to accept the settlement reached by the plaintiff group with Schumacher. Because we agree with the district court that the language of the agreement is unambiguous, we will affirm. In a related matter, Schumacher appeals the district court's order to unseal the settlement agreement. Because we do not believe the document is a judicial record, we will reverse.

I.

On May 24, 1990, before instituting an antitrust suit against Schumacher, the nine plaintiffs entered into a confidential litigation agreement to "govern the participation of the signatories in the Litigation."

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* The Honorable Myron H. Bright, United States Circuit Judge for the Eighth Judicial Circuit, sitting by designation.

Appendix C

The agreement provided in relevant part:

5. From time to time during the course of the Litigation, the Committee will be asked to make decisions regarding the governance of the Litigation. Such decisions shall be made by a majority vote of the representatives of all of the Committee members, and shall be final, conclusive and binding on all members of the Committee. All members of the Committee will be given advance notice of any votes. . . .

6. Any member of the Committee may choose to withdraw as a litigant, and leave the Committee, at any time. . . .

10. Each signatory is free to enter into separate agreements with one or more of the defendants. When a signatory settles separately with all defendants, that settlement shall be deemed a withdraw within the meaning of Paragraph 6 of this Agreement.

11. Where a settlement proposal is tendered by one or more of the defendants to all signatories as a group, the group shall vote on that proposal using the procedure set forth in Paragraph 5 of this Agreement.

13. This Agreement shall not be amended or modified except by a written amendment executed by a duly authorized representative of each of the signatories.

Appendix C

The plaintiffs retained the law firm of Kohn, Swift & Graf, P.C. to represent them in the litigation.

On May 25, 1990, plaintiffs initiated this action in the United States District Court for the Eastern District of Pennsylvania alleging *inter alia* that defendants conspired in violation of Section I of the Sherman Act. Subsequently, defendants moved for summary judgment, and the district court (the Honorable Daniel H. Huyett, III,) granted the motion. *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 1992 WL 59096 (E.D. Pa. Mar. 19, 1992).

On appeal, we reversed and remanded on two of the federal antitrust claims and the corresponding state claims. *Alvord-Polk. Inc. v. F. Schumacher & Co.*, 37 F.3d 996 (3d Cir. 1994). Following extensive discovery, the case was tried to a jury. After an eight-week trial, the jury hung, and Judge Huyett declared a mistrial. The case was reassigned to the Honorable Thomas N. O'Neill, Jr. for retrial.

The mistrial prompted the parties to enter into settlement discussions in earnest. On August 22, 1996, Harold Kohn informed all members of the committee that Schumacher had made a settlement offer to the group. At a settlement conference on September 24, 1996, attended by principals and attorneys of all plaintiffs, negotiations between American Blind and Schumacher broke down, and some of the plaintiffs called for a vote on the Schumacher proposal. Although American Blind refused to participate in the vote, the other eight plaintiffs voted unanimously to accept the proposal.

On November 22, 1996, the eight plaintiffs filed a motion to enforce the settlement. On January 13, 1997, Magistrate

Appendix C

Judge Leomporra issued a report and recommendation, recommending the motion to enforce the settlement be granted. On July 8, 1997, the district court issued a memorandum and order granting the motion to enforce the settlement, and on July 30, 1997, entered final judgment under Fed. R. Civ. P. 54(b) holding American Blind was bound by the settlement agreement.

II.

The district court bad jurisdiction under 28 U.S.C. §§ 1331 and 1337 and 15 U.S.C. §§ 15 and 26. We have jurisdiction under 28 U.S.C. § 129 1. We exercise plenary review over the district court's finding that the agreement was unambiguous. *Allegheney International, Inc. v. Allegheney Ludlum Steel Corp.*, 40 F.3d 1416, 1424 (3d Cir. 1994). We review the grant or modification of a confidentiality order for abuse of discretion, though we exercise plenary review over the district court's interpretation and application of the legal standard for granting or modifying a confidentiality order. *Pansy v, Borough of Stroudsburg*, 23 F.3d 772, 783-84 (3d Cir. 1994).

III.

"A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." *Hutchison v, Sunbeam Coal Corp.*, 513 Pa. 192, 519 A.2d 385, 390 (1986) (citations omitted) (applying Pennsylvania law). Whether an ambiguity exists is a question of law. *Id.* The district court determined that the language of the litigation agreement was unambiguous and found the majority vote to accept the settlement to be final, conclusive, and binding on American Blind. We agree. As the district court

found, the agreement authorizes a signatory to "withdraw as a litigant, *and* leave the Committee, at any time" (emphasis supplied) thus permitting signatories to withdraw from the committee only when also withdrawing from the litigation. The agreement does not, as American Blind contends, permit a signatory to withdraw as a litigant or leave the Committee at any time (emphasis supplied).

American Blind contends it can withdraw (and did withdraw) from the committee for settlement purposes, but this is an unreasonable construction of the agreement. As the district court reasoned, "The agreement, by requiring a full committee vote on group settlement proposals and by making the majority vote on such proposals final, conclusive and binding upon all committee members, recognized that members of the committee might disagree on whether to accept a group settlement and expressly bound all members to the result of a majority vote. The agreement cannot reasonably be construed to permit a committee member to withdraw from a binding majority vote on a group settlement proposal. . . ." *Alvord-Eolk, Inc. v. F. Schumacher & Co.*, Civ. No. 90-3617 (July, 1997) at 3. A contrary interpretation would allow any committee member to withdraw from the committee whenever that member disagreed with a group settlement, rendering the majority vote provision meaningless.

American Blind contends the district court's construction renders its right to reach a separate settlement with the defendant under paragraph 10 worthless. We disagree. American Blind could have negotiated a separate settlement with Schumacher prior to the group settlement, which, by the terms of the contract, would have been "deemed a withdrawal within the meaning of Paragraph 6" of the agreement. But once

Schumacher offered a settlement to the group and a majority of the Committee agreed to it, American Blind could no longer negotiate a separate settlement.

American Blind also asserts it did not receive sufficient notice of the September 24, 1996 vote, Paragraph 5 of the agreement specifies the parties receive "advance notice of any vote." On August 22, 1996, Harold Kohn informed all members of the committee that Schumacher had made a settlement offer to the group and asked the committee to meet and vote on August 26, 1996, three days before the parties were scheduled to appear at a settlement conference before Magistrate Judge Leomporra. On August 23, 1996, American Blind objected by letter to a vote on short notice. Subsequently, because of unavailability of counsel, the settlement conference was postponed until September 24, 1996. There were extensive discussions at the settlement conference. After American Blind and Schumacher were unable to reach a settlement, some of the plaintiffs called for a vote on the Schumacher proposal. For more than a month, American Blind had been fully aware of the proposed settlement. As noted, Kohn had proposed a vote on the settlement proposal in August. Under these circumstances, American Blind cannot say it did not have sufficient notice of the vote.

IV.

Schumacher appeals the district court's order unsealing the settlement agreement, contending the agreement is not a judicial record and, in the alternative, consideration of the *Pansy* factors weigh in favor of confidentiality. *Pansy v. Borough of Stroudsburg,* 23 F.3d 772 (3d Cir. 1994). We agree on both counts and will reverse.

Appendix C

The existence of a common law right of access to judicial proceedings and to inspect judicial records is "beyond dispute." *Leucadia Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 161 (3d Cir. 1993) (citations omitted). Typically, when a settlement agreement is filed with the district court, it becomes a judicial record for purposes of the right of access doctrine because the district court must enforce or interpret the terms of the agreement. *See Enprotech Corp. v. Renda*, 983 F.2d 17, 20 (3d Cir. 1993) ("[W]hen a settlement is filed with a district court and becomes a judicial record, or when the parties seek interpretative assistance from the court or otherwise move to enforce a settlement provision, then the settlement documents can become part of the public component of a trial.")

But the parties here agreed to file nothing more than a stipulation of dismissal under Fed. R. Civ. P. 41(a)(1). Plaintiffs submitted a copy of the settlement agreement without the consent of Schumacher. Significantly, the terms of the settlement agreement were not relevant to the district court's determination of the parties' obligations under the litigation agreement. The court was only required to decide whether American Blind was bound by the terms of the litigation agreement to the settlement agreement. Because this determination did not involve interpreting or enforcing the settlement agreement, we hold that it is not a judicial record.

Even if the settlement agreement were a judicial record, we believe that it should remain under seal. The "right of access [to judicial records] . . . is not absolute." *Bank of Am. Nat'l Trust & Savings Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344 (3d Cir. 1986). We must weigh the parties' interest in confidentiality against the public interest in access to judicial records. *Pansy*, 23 F.3d at 786. In conducting this case-specific

inquiry, we consider *inter alia:* (1) the judicial policy of encouraging settlements; (2) whether the documents were filed in reliance upon a court's order granting confidentiality; (3) the parties' interest in privacy; (4) whether the information bears on public health or safety; (5) whether parties seeking secrecy are public entities or officials; and (6) whether the settlement involves issues of a public nature. *Id.* at 789-90.

The settlement agreement addresses a private dispute, not a matter of public concern. Thus, the last three factors weigh in favor of nondisclosure. Moreover, preserving the privacy of the settlement agreement serves the judicial policy of encouraging settlements, particularly in a protracted, expensive, multi-party litigation like this one. As for the second factor, we note that Schumacher relied on the district court's confidentiality order to the extent that it did not attempt to remove the settlement agreement from the record once plaintiffs had filed it under seal. Finally, under the third factor, we believe Schumacher has a strong privacy interest in this case. Schumacher expressly conditioned its settlement with the plaintiffs on confidentiality in part to avoid copycat lawsuits. By unsealing the record, Schumacher was deprived of the confidentiality it bargained for.

V.

For the foregoing reasons, we will affirm in part and reverse in part and remand for proceedings consistent with this opinion.

TO THE CLERK:

Please file the foregoing opinion.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED JULY 31, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 90-3617

ALVORD-POLK, INC. et al.

v.

F. SCHUMACHER & CO. et al.

ORDER

AND NOW this day of July, 1997 it is hereby ORDERED that plaintiff American Blind Factory (now known as American Blind and Wallpaper Factory, Inc.) is bound by the settlement agreement between the other eight plaintiffs and defendant F. Schumacher & Co.

Final judgment is hereby entered, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, in favor of plaintiffs Alvord-Polk, Inc., Fairman Wallpaper and Paint Company, Frank R. Yocum t/a Frank R. Yocum and Sons Wallpaper Co., Harry's Wallpaper, Inc., Lancaster Carpet Mart, Inc., Marvin Kolsky t/a Headquarters Windows and Walls, Silver Wallpaper & Paint Co., Inc. and Yankee Wallcoverings, Inc. and defendant F. Schumacher & Co. and against plaintiff American Blind Factory (now known as American Blind and Wallpaper Factory) binding plaintiff American Blind Factory (now known as American Blind and Wallpaper Factory) to the terms of the

Appendix D

Settlement Agreement between plaintiffs Alvord-Polk, Inc., Fairman Wallpaper and Paint Company, Frank R. Yocum t/a Frank R. Yocum and Sons Wallpaper Co., Harry's Wallpaper, Inc., Lancaster Carpet Mart, Inc., Marvin Kolsky t/a Headquarters Windows and Walls, Silver Wallpaper & Paint Co., Inc. and Yankee Wallcoverings, Inc. and defendant F, Schumacher & Co.

s/ Michael E. Kunz
CLERK OF THE COURT

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED JULY 30, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 90-3617

ALVORD-POLK, INC. et al.

v.

F. SCHUMACHER & CO. et al.

ORDER

On May 25, 1990, this case was commenced by plaintiffs Alvord-Polk, Inc., American Blind Factory, Inc., (now known as American Blind and Wallpaper Factory, Inc.) ("ABWF"), Delta Paint and Wallpaper Supply Co., Inc., Fairman Wallpaper and Paint Company, Frank R. Yocum t/a Frank R. Yocum and Sons Wallpaper Co., Harry's Wallpaper, Inc., Lancaster Carpet Mart, Inc., Marvin Kolsky t/a Headquarters Windows and Walls, Silver Wallpaper & Paint Co., Inc. and Yankee Wallcoverings, Inc. against defendants F. Schumacher & Co. and the National Decorating Products Association, Inc. Delta Paint and Wallpaper Supply Co., Inc. is no longer a plaintiff in the litigation.

On November 21, 1996, plaintiffs Alvord-Polk, Inc., Fairman Wallpaper and Paint Company, Frank R. Yocum t/a Frank R. Yocum and Sons Wallpaper Co., Harry's Wallpaper, Inc., Lancaster Carpet Mart, Inc., Marvin Kolsky t/a

Headquarters Windows and Walls, Silver Wallpaper & Paint Co., Inc., and Yankee Wallcoverings, Inc. (the "Eight Plaintiffs") filed a motion to enforce the Settlement Agreement reached by the Eight Plaintiffs and defendant F. Schumacher & Co. against ABWF. ABWF opposed the motion. The Court referred the motion to Magistrate Judge Tullio Gene Leomporra.

On January 13, 1997 Judge Leomporra entered a Report and Recommendation that the motion to enforce the Settlement Agreement be granted. ABWF filed objections thereto. On July 8, 1997 this Court entered an Order approving the Report and Recommendation and granting the motion to enforce the Settlement Agreement. The parties submitted proposed forms of judgment to be entered pursuant to that Order.

AND NOW, this 29 day of July, 1997, it is hereby ORDERED that this Court expressly determines, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay in the entry of final judgment in favor of plaintiffs Alvord-Polk, Inc., Fairman Wallpaper and Paint Company, Frank R. Yocum t/a Frank R. Yocum and Sons Wallpaper Co., Harry's Wallpaper, Inc., Lancaster Carpet Mart, Inc., Marvin Kolsky t/a Headquarters Windows and Walls, Silver Wallpaper & Paint Co., Inc. and Yankee Wallcoverings, Inc. and defendant F. Schumacher & Co. and against plaintiff American Blind Factory, Inc., (now known as American Blind and Wallpaper Factory, Inc.) binding plaintiff American Blind Factory, Inc. (now known as American Blind and Wallpaper Factory, Inc.) to the terms of the Settlement Agreement between the Eight Plaintiffs and defendant F. Schumacher & Co.;

IT IS FURTHER ORDERED that the Clerk of the Court is expressly directed, pursuant to Rule 54(b) of the Federal Rules

of Civil Procedure, to enter a final judgment in the form attached hereto;

IT IS FURTHER ORDERED that entry of judgment in the form attached hereto shall not affect plaintiffs' claims against defendant National Decorating Products Association, Inc.;

IT IS FURTHER ORDERED that the Memorandum attached to the Court's July 8, 1997 Order and the record related to the Eight Plaintiffs' motion to enforce settlement shall remain under seal for sixty (60) days from the date of this Order and shall thereafter be unsealed;[1]

---

1. The Court has weighed the interests in confidentiality against the public interest in access to judicial records. Plaintiffs' litigation agreement and related communications, which were filed with the Court for judicial interpretation and enforcement thereof, are part of a public judicial record. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 781 (3d Cir. 1994); *Bank of America Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse*, 800 F.2d 339, 345 (3d Cir. 1986) ("Having undertaken to utilize the judicial process to interpret the [agreement] and to enforce it, the parties are no longer entitled to invoke the confidentiality accorded [such] agreements"). The record, including the agreement itself, reveals few if any privileged attorney-client communications and few if any mental impressions or strategies of counsel. The interest in public access outweighs any interest in continued confidentiality. However, the record will remain sealed for sixty days to preserve the effectiveness of any appeal from this Order. Because the original order sealing the record permitted unsealing upon "further order" of the Court, plaintiffs' reliance on that order does not justify continued confidentiality where, upon balancing the competing interests, it appears that a "further order" unsealing the record is warranted.

Defendant contends that its interest in keeping the terms of the settlement agreement from other potential plaintiffs outweighs the public

(Cont'd)

Appendix E

IT IS FURTHER ORDERED that this action shall be placed in this Court's Civil Suspense File and marked closed for statistical purposes, the Court having been advised that the action cannot proceed to trial and disposition until resolution of any and all appeals taken from the Court's Rule 54(b) final judgment;

IT IS FURTHER ORDERED that the Court shall retain jurisdiction and that the case will be restored to the trial docket when the parties notify the Court in writing that the action is in a status so that it may proceed to final disposition.

s/ Thomas N. O'Neill
THOMAS N. O'NEILL, JR., J.

(Cont'd)
interest in disclosure of that agreement. I disagree. In contrast to cases where the court merely entered a stipulation of dismissal in light of an unfiled settlement agreement, in this case defendant joined in the Eight Plaintiffs' motion to enforce a settlement agreement filed of record and thus availed itself of the judicial forum. *Cf.* Pansy, 23 F.3d at 781; *Enprotech Corp. v. Renda*, 983 F.2d 17, 20-21 (3d Cir. 1993); *Bank of America*, 800 F.2d at 345. Given this participation in judicial proceedings to enforce the settlement, defendant's interests do not outweigh the public interest in access to judicial records merely because defendant did not initially seek to file the agreement or because the order effectively enforced the agreement without interpreting its terms. The settlement agreement shall be unsealed along with the rest of the record.

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED JULY 8, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 90-3617

ALVORD-POLK, INC. et al.

v.

F. SCHUMACHER & CO. et al.

ORDER

AND NOW this 8th day of July, 1997 upon consideration of the majority plaintiffs' application to enforce settlement, the Report and Recommendation of Magistrate Judge Tullio Gene Leomporra and the parties' filings related thereto it is hereby ORDERED that the Report and Recommendation is APPROVED and the application to enforce settlement is GRANTED.

It is further ORDERED that the Clerk of the Court shall file the attached Memorandum under seal and shall provide copies of the attached Memorandum only to counsel of record for any plaintiff or plaintiffs.

It is further ORDERED that on or before July 21, 1997 the parties shall submit an agreed form of judgment to be entered pursuant to this Order.

Appendix F

It is further ORDERED that the Clerk of the Court shall keep the attached Memorandum under seal until sixty (60) days have elapsed following the date of entry of judgment. Until the expiration of the sixty (60) day period following the entry of judgment the attached Memorandum shall not be disclosed to any person other than plaintiffs and plaintiffs' counsel except upon further Order of this Court.

It is further ORDERED that the Order dated November 26, 1996 sealing the record pertaining to the dispute among the plaintiffs shall remain in effect until sixty (60) days have elapsed following the date of entry of judgment.

It is further ORDERED that on the sixty-first (61st) day from the date of this Order the Clerk shall unseal the attached Memorandum and the sealed record and allow them to become matters of public record. This Order is based upon the Court's balancing of plaintiffs' interest in maintaining the confidentiality of materials filed under seal against the public interest in access to judicial records and proceedings.[1]

The motion to exclude defendants from further proceedings regarding the dispute among the plaintiffs is DENIED as moot.

The Order dated May 28, 1997 specially listing this case and attaching counsel for trial is hereby VACATED.

s/ Thomas N. O'Neill
THOMAS N. O'NEILL, JR. J.

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1. The purpose of the sixty day period provided for herein is to allow any party to seek relief from the terms of this Order from the Court of Appeals. The attached Memorandum and the sealed record may, of course, be transmitted to that Court if any proceeding is commenced therein.

APPENDIX G — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JULY 8, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 90-3617

ALVORD-POLK et al.

v.

F. SCHUMACHER & CO. et al.

O'Neill, J. July 8, 1997

MEMORANDUM

On May 24, 1990, the nine plaintiffs entered into a confidential Litigation Committee Agreement to "govern the participation of the signatories in the Litigation."[1] Eight plaintiffs contend that this Agreement binds the ninth plaintiff, American Blind and Wallpaper Factory, to accept the settlement approved by all other plaintiffs on September 24, 1996.

The relevant portions of the agreement provide as follows:

> 5. From time to time during the course of the Litigation, the Committee will be asked to make decisions regarding the governance of the Litigation. Such decisions shall be made by a

1. An additional plaintiff withdrew from the litigation.

majority vote of the representatives of all of the Committee members, and shall be final, conclusive and binding on all members of the Committee. All members of the Committee will be given advance notice of any votes. . . .

6. Any member of the Committee may choose to withdraw as a litigant, and leave the Committee, at any time. . . .

. . . .

10. Each signatory is free to enter into separate settlement agreements with one or more of the defendants. When a signatory settles separately with all defendants, that settlement shall be deemed a withdrawal within the meaning of Paragraph 6 of this Agreement.

11. Where a settlement proposal is tendered by one or more defendants to all signatories as a group, the group shall vote on that proposal using the procedure set forth in Paragraph 5 of this Agreement.

. . . .

13. This Agreement shall not be amended or modified except by a written amendment executed by a duly authorized representative of each of the signatories. . . .

Appendix G

In this case defendant F. Schumacher & Co. tendered a settlement proposal to plaintiffs as a group. Pursuant to paragraph 11, the group voted to accept the proposal "using the procedure set forth in Paragraph 5," which mandates that "decisions shall be made by a majority vote . . . and shall be final, conclusive and binding on all members. . . ."[2] Thus the majority vote to accept the settlement is final, conclusive and binding on ABWF.

ABWF contends that it is not bound by these provisions because it withdrew from the Committee for settlement purposes pursuant to paragraph 6. However, paragraph 6 does not authorize withdrawal from the committee for a limited purpose, but rather allows a signatory to "withdraw as a litigant, and leave the Committee, at any time" and thus permits signatories to withdraw from the committee only when also withdrawing from the litigation.[3] ABWF remains engaged in this litigation and thus has not withdrawn as a litigant, Therefore ABWF has not withdrawn within the meaning of paragraph 6.[4]

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2. ABWF, although present when the vote was called, refused to participate in the vote. *See* Ex, 2 at 20 (affidavit of ABWF's counsel stating "the other plaintiffs called for a vote . . . . I advised [them] that ABWF was not participating in any vote, and . . . left the room,").

3. A litigant is "a party to a lawsuit, one engaged in litigation. . . ." Black's Law Dictionary, Revised 4th ed.

4. Paragraph 6 is not phrased disjunctively to allow a member to "withdraw as a litigant or leave the committee at any time." Its conjunctive language allowing a member to "withdraw as a litigant *and* leave the Committee" (emphasis added), belies ABWF's contention that members may withdraw from the committee for certain purposes without withdrawing from the litigation.

Appendix G

The agreement, by requiring a full committee vote on group settlement proposals and by making the majority vote on such proposals final, conclusive and binding upon all committee members, recognized that members of the committee might disagree on whether to accept a group settlement and expressly bound all members to the result of a majority vote. The agreement cannot reasonably be construed to permit a committee member to withdraw from a binding majority vote on a group settlement proposal when the agreement expressly binds all members to such a vote.[5]

ABWF contends that its right under paragraph 10 to enter into a separate settlement agreement supports its position that it is not bound by a majority vote to accept a group settlement. I do not agree. ABWF never entered into a separate settlement agreement. Thus paragraph 10 does not apply, Plaintiffs, however, received a settlement proposal tendered to them as a group. Therefore paragraphs 5 and 11 do apply. These provisions bind all plaintiffs to a majority vote to accept a settlement proposal and do not exempt plaintiffs like ABWF

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5. ABWF's interpretation simply eliminates the phrase "as a litigant" and construes paragraph 6 to allow a member to "withdraw . . . and leave the committee at any time." This construction would allow any committee member to withdraw from the committee whenever faced with an unfavorable vote, rendering the majority-vote provision meaningless. This unreasonable construction does not give rise to an ambiguity. *See Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 613 (3d Cir. 1995) (holding that contract is ambiguous "if and only if it is reasonably susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning. . . . [A] contract is not rendered ambiguous by the mere fact that the parties do not agree on the proper construction.").

who were pursuing, but who had not yet entered into, a separate settlement agreement.

ABWF also contends that the doctrines of supervening frustration and impracticability preclude enforcement of the agreement. I do not agree. These doctrines apply only when unforeseen circumstances arising after entry of an agreement negate a basic assumption underlying the agreement. *See* Restatement 2d of Contracts §§ 265, 261 (1979).

The agreement expressly contemplates pursuit of monetary relief as well as products and does not require any particular proportion between the two forms of relief. *See* § 12 (noting that any "monetary settlement . . . will be distributed equally"). The agreement also requires all plaintiffs to share equally the costs of the litigation and to distribute equally the proceeds of any group settlement, *see* §§ 3, 12, despite differences in each plaintiff's prosperity and potential damages. *See* § 9 (requiring each plaintiff to prove its own damages). Thus neither the ratio of cash to products offered in the settlement proposal nor the economic disparity among the plaintiffs constitutes an unforeseen circumstance precluding enforcement of the agreement.[6]

Under the unambiguous language of the agreement, as long as ABWF remains a litigant, which it does to this day, it is

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6. Nor does the failed attempt to settle in two groups undermine the agreement's enforceability. The resolution to attempt a two-group settlement did not purport to amend the agreement and was not adopted by unanimous written consent as required to amend the agreement. *See* ¶ 16. Thus the resolution to attempt to settle in two groups did not preclude a vote on the proposal tendered to plaintiffs as one group after the two-group approach failed.

bound by the terms of the agreement including the provisions that bind it to the results of a majority vote on a group settlement proposal.[7] Because the agreement does not permit ABWF to withdraw from the group settlement vote while remaining a litigant, I need not consider the extrinsic evidence which ABWF contends demonstrates its intent to do so or the evidence proffered to refute ABWF's extrinsic evidence.[8] Because

7. This Court must enforce the terms of the agreement as written and must not substitute its own judgment as to the terms that would yield the most equitable result. *See Steuart v. McChesney*, 444 A.2d 659, 663 (Pa. 1982).

8. The exhibits offered by ABWF, even if considered, reveal only ABWF's unilateral attempts to withdraw from a binding group settlement vote while remaining in the litigation and to revoke the committee's counsel's authority to negotiate on behalf of the full committee. The unambiguous language of the agreement forecloses such actions. The exhibits do not reveal any other party's acquiescence in ABWF's position but reveal only that the committee continued to seek ABWF's involvement in group settlement efforts without prejudice either to ABWF's position or to the other plaintiffs' rights under the agreement. *See* Ex. 2 Q.

The exhibits also reveal that ABWF was notified a vote was imminent and was present when the vote was called. *See* Ex. 2 (letter from counsel to committee stating that group settlement offer "now requires a vote"); Ex. 20 (letter from ABWF objecting to vote being called "on 48 hours notice"); Ex. 2 at 20 (affidavit of ABWF's counsel stating "the other plaintiffs called for a vote . . . . I advised [them] that ABWF was not participating in any vote, and . . . left the room."). Thus even if there was a breach of paragraph 5 — which does not define 'advance notice' — ABWF suffered no prejudice therefrom.

Similarly, because any breach of the agreement's confidentiality provision occurred after the vote, such breach would not affect the

(Cont'd)

interpretation of the binding agreement among plaintiffs requires no further proceedings, I need not decide whether plaintiffs would be entitled to exclude defendants from such proceedings.

(Cont'd)

binding nature of the vote. Finally, even if there was an oral promise to delay the vote, such promise did not modify the agreement, which can be modified only by unanimous written consent. *See* ¶ 16. Because plaintiffs did not waive the unanimous written consent provision, the agreement remains binding and enforceable despite any oral promises, especially absent consideration therefor. *See Mutual Life Ins. Co. v. Bank of New England-Corp.*, 756 F. Supp. 856, 858-59 (E.D. Pa. 1991); *Somerset Community Hosp. v. Allan B. Mitchell & Assoc., Inc.*, 685 A.2d 141, 146 (Pa. Super. 1996).

APPENDIX H — TRANSCRIPT OF PROCEEDINGS DATED FEBRUARY 13, 1997

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 90-CV-3617

Philadelphia, Pennsylvania
Thursday, February 13, 1997

ALVROD-POLK, INC.

Plaintiff

vs.

F. SCHUMACHER & COMPANY et al.

Defendants

HEARING

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE THOMAS M. O'NEILL, JR.
UNITED STATES DISTRICT COURT JUDGE

* * *

[2] (At 10:05 a.m. In open court.)

DEPUTY CLERK: All rise. You may be seated, everyone.

Appendix H

THE COURT: All right. The first thing I'd like to do is to take up the question of who is and who isn't entitled to participate in this proceeding. I guess that's your burden, Mr. Reich.

MR. REICH: Yes, your Honor. May it please the Court, Abe Reich on behalf of American Blind and Wallpaper. As your Honor knows, there was — if you want I'll —

(Discussion held off the record.)

THE COURT: Since I'm hard of hearing, it would help me.

MR. REICH: Yeah, thank you.

As your Honor knows, there was an order entered by this Court on November 26th, 1996 sealing the record and it was pursuant to that directive that on behalf of our client, we filed an extensive appendix with numerous exhibits under seal, our briefs were filed under seal.

This, as you know, is a dispute exclusively among the plaintiffs having to do with whether or not they are bound by an agreement that was entered into in 1990 at the outset of this litigation. We have filed with the Court, a motion and memorandum, asking your Honor to enforce or re-enforce the order that was previously entered by this Court. In my judgment, not to do so, would be — it would do extreme damage to all of the [3] plaintiffs and —

THE COURT: Well, now we're going to have to focus on that. The fact that I signed the order, no objection being entered

to it, that's not at all conclusive. I'm now asked to do a very serious thing, I'm now asked to close my courtroom to a party.

MR. REICH: Yes, your Honor.

THE COURT: Now, that — that —

MR. REICH: And — and I am very mindful of that kind of —

THE COURT: So I've got to know precisely what it is that's going to come out in these proceedings that you say warrants that —

MR. REICH: Let me — let me —

THE COURT: — that extraordinary relief and then, of course, before I rule on it, I will, of course, give counsel for the defendants an — or anyone else — an opportunity to be heard on that.

MR. REICH: Yes, your Honor.

And I do understand the nature of what we're asking to be done this morning and I am very mindful of both the directive of the Third Circuit in Glen Mead and in PANSI (phonetic) and the kinds of considerations that were laid out in PANSI and in Glen Mead —

THE COURT: Well, it's even more than those cases [4] because those cases involved confidentiality agreements —

MR. REICH: Right.

Appendix H

THE COURT: — as I recall, but I had a very meaningful experience in closing my courtroom while I interrogated jurors in the Scarfo litigation and found myself up in the Court of Appeals, so closing the doors of the courtroom is a different animal.

MR. REICH: I understand that and what we are asking you not to permit be opened to the public or anyone in this courtroom, other than the parties that are privy to it, are those kinds of things that for many, many years courts have recognized of being as the utmost information that should be protected. What we're talking about is classic attorney/client privileged information and work-product information. That is to say, this is a dispute exclusively among the plaintiffs.

There will be absolutely no prejudice to the defendants, whether they hear this or not. They certainly would probably like to hear it, because — but there will be severe prejudice to all of the plaintiffs. That motion which was made before Judge Leomporra was, in fact, joined by the others, no one objected to it, except for, perhaps, the Schumacher interests and they can speak for themselves, but this is classic attorney/client privilege, it is work product. It is the mental impressions of counsel and the clients as to what was important or not important in the settlement negotiations as to various [5] positions taken with respect to the settlement posture of the case at various times in the case and, in fact, various positions taken by my client in contrast to the other plaintiffs as late as the fall of 1996, which led to the filing of this motion.

So, your Honor, I would respectfully submit that this is precisely the kind of information that should be protected, the court should be closed, because it is simply a dispute among

plaintiffs, it is as though you were sitting in the counsel's office and you were arbitrating a dispute among then and there is no reason why the defendants or the public should have access to any of this information.

THE COURT: Let me ask you this: What's your perception of the point that I'm here to decide today, it is whether I approve Magistrate Leomporra's recommendation and hold that all plaintiffs are bound by the settlement, right?

MR. REICH: That is the issue before you and —

THE COURT: Now, why is —

MR. REICH: — you —

THE COURT: — why is the kind of testimony or evidence that you've mentioned relative to that determination?

MR. REICH: Because it involves an interpretation of an agreement that is reflected by a course of conduct over the period of a year and a half, that is exclusively communications between and among counsel and their clients. I am not talking [6] about communications that may have been involved with the Court or —

THE COURT: I understand that's the nature of what you want to protect. I'm asking, why is that relevant, if the agreement is clear on its face and it's not ambiguous —

MR. REICH: Well —

THE COURT: — why is that evidence relevant?

MR. REICH: It —

THE COURT: I know I said I would hear it, but that was — I said I'd hear it, subject to the normal objections.

MR. REICH: Yes, your Honor.

Number one, the agreement as witnessed by the hundreds of pages of documents that have been filed before you, is not clear on its face, there is a significant difference of view as to what it means and its interpretation.

Number two, you are here to review the issue de novo and will — as our opponents, co-plaintiffs in this case — have requested — want to put on testimony, which despite our objection, your Honor has granted and they wish to put on testimony and —

THE COURT: Well, I've —

MR. REICH: — for us to —

THE COURT: I've said that I won't foreclose them from producing evidence at this hearing, but that's subject to the normal objections as to whether it's relevant and otherwise [7] admissible, naturally.

MR. REICH: Your Honor, our objection at least as to putting on testimony had less to do with whether it was relevant, but there was a procedure put in place that allowed them the opportunity to submit affidavits, as we did or to submit supplemental materials, which we did not object to. They now wish to put testimony on and for me to effectively cross-

examine that testimony — and, again, I have no idea what it is, precisely, they will be saying, cause this is an unusual proceeding in the sense I've never deposed them — and so for me to effectively cross-examine them, I believe I will need to evoke what will be exclusive communications between counsel and their clients. Those communications, I think, are highly confidential, the revelation of which could be prejudicial to the lawyers, it could be prejudicial to the clients. And I see no reason why the public needs to know that information or the defendants in this case, your Honor.

THE COURT: Now, I mean, I — I understand that's your position. I'm just trying to get a handle on — on what it is. Now, you say that privileged information between you and your client, is going to come out, is that right?

MR. REICH: The term, you -- the term, you, again, your Honor, I was not directly involved, but, yes, between —

THE COURT: No, I mean, that's your present expectation?

[8] MR. REICH: Yes. Yes, expectation that —

THE COURT: Now, how does that information come out, if it's confidential, unless you offer it?

MR. REICH: Your Honor, the only way that you can, in my judgment, effectively interpret the agreement and the position of the respective parties, is to understand the course of conduct of the lawyers, vis-a-vis, their clients.

THE COURT: Well, first of all, respond to my question. How does something that presently is confidential between you and your client —

MR. REICH: Yes.

THE COURT: — come out through the testimony of Ms. Zack, a lawyer for another plaintiff, unless you offer it?

MR. REICH: Your Honor, Ms. Zack was and remains to this day, counsel to my client. We are personal counsel to American Blind and were brought in to the case in August of and so the communications that will be brought —

THE COURT: Now, wait, wait, wait, wait, wait, wait. I'm confused. All right.

MR. REICH: Okay.

THE COURT: Straighten me out.

MR. REICH: Let me give you the players —

THE COURT: I have you and Ms. Resnick representing American Blind.

MR. REICH: That is correct, your Honor.

[9] THE COURT: I have Joanne Zack representing the other plaintiffs.

MR. REICH: Jo —

THE COURT: But you're saying that she represented you as well.

MR. REICH: She's — to this day, still does, because of the apparent conflict —

THE COURT: Okay.

MR. REICH: — in her arguing in favor of one client against another, Mr. Eastburn and Mr. Karsch were brought in to represent —

THE COURT: Right.

MR. REICH: — those clients. She to this day and her firm to this day, continues to represent American Blind, my client. And it's because of the unique issue that is before this Court that we have —

THE COURT: Well now, okay. Now, your client — Mr. Eastburn, is it admitted that Ms. Zack has acted for American Blind?

MR. EASTBURN: That is correct.

THE COURT: All right. Well now then, Mr. Reich, if I direct Ms. Zack — you're asserting the attorney/client privilege on behalf of your client with respect to Ms. Zack's testimony, correct?

MR. REICH: Your Honor, what I am saying is that [10] because of the nature of the issue before you, we will have to — I don't see how she can testify without disclosing that.

THE COURT: Well, my question is, if you're asserting that the attorney/client privilege and directing Ms. Zack not to reveal anything that passed between your client and her in the lawyer/client relationship, I can direct her not to testify to that.

MR. REICH: And, your Honor, she is put on the horns of a dilemma, because her other clients want her to reveal that information.

THE COURT: Well, no, she can't, if I direct her to observe the attorney/client privilege, that's the end of it, she's not going to do it.

MR. REICH: I understand that. There is also another issue, your Honor, and that is the agreement which —

THE COURT: I mean, I don't know what that leaves of her testimony, but —

MR. KARSCH: Your Honor, if I may, the affidavit of Ms. Resnick is replete with representations of conversations, correspondence, discussions between her client, Ms. Resnick and Ms. Zack and to preclude that testimony and to accept —

THE COURT: Well, that's waiver then. You're arguing waiver?

MR. KARSCH: I'm arguing waiver and also prejudice, if we are unable to refute —

[11] THE COURT: Before you get to prejudice, maybe — there is no prejudice if I don't consider that.

MR. KARSCH: I agree with you, your Honor.

THE COURT: And it seems to me what you're arguing legally is waiver of the privilege by the filing of the affidavit.

MR. KARSCH: Yes, your Honor.

MR. REICH: There is an —

THE COURT: All right. Yeah, thank you.

Go ahead and finish. Then I want to hear from all the other parties —

MR. REICH: Yes, your Honor.

THE COURT: — and then I want to think about this, obviously.

MR. REICH: The one — another point I want to underscore is the agreement that is at issue before your Honor this morning, contains a confidentiality provision, that's number one. Number two, our disclosure of communications that were exclusively communications between and among counsel and their clients was done in reliance upon the order that you entered in November and I understand, you're saying you're writing from a clean script today, but I must emphasize —

THE COURT: Well, I — in the sense that it's not automatically doesn't follow that I can close my courtroom —

MR. REICH: And I —

[12] THE COURT: — because I entered an unopposed secrecy order.

MR. REICH: Your Honor and I respect that, I — I do understand the difficult choice that a trial judge has when faced

with that, but in my judgment — the point I'm making is we relied on it, for better or worse in which, you know, and so in terms of whether it was a waiver or not, we assumed that they would be closed. Number two, I would simply reiterate — and I will sit down — there is A, no prejudice to the defendants from being excluded from this and there is a great deal of prejudice that will inure to all to all of the plaintiffs by opening the courtroom. Thank you, your Honor.

THE COURT: All right. Thank you.

Now, Mr. Eastburn, let me hear from you next on this point only and then I want to hear from counsel for the defendants, please.

MR. EASTBURN: May it please the Court and good morning.

It seems to me, you just heard several moments ago, where this case should end up and that is when eminent counsel, Mr. Reich, said that Joanne Zack is still representing American. Then, your Honor, they haven't withdrawn from the litigation and they admit that, so, I think all this argument is dancing on the head of a pin. But if you'll look at the four corners of the litigation agreement and you go to Paragraph 19, there might be [13] a very simple way to address all this and that is, this is to be held in the strictest confidence, except by order of the Court. So, you could order today that this be presented and I think Judge Leomporra was faced with the same kind of issue and I suggested to him, that at least in part, a way around this, would be to address — by court order — Paragraph No. 19.

The other thing that you could do procedurally, is to bifurcate the hearing and to say that, if it is relevant — and I question seriously whether it is — the extensive twenty-nine page affidavit by Attorney Resnick, one of the counsel in this case, in terms of what went on between her client and Schumacher, the defendant, then that clearly is going to have to be rebutted and under those circumstances, Schumacher would have to be present. So, I think that there is a procedural way you could handle this, your Honor.

THE COURT: Okay.

MR. EASTBURN: But I think we're getting far afield of what the real issue is here and I don't think we have to get into any of that.

THE COURT: All right. Thank you.

Let me hear from the defense, then I want to stop and think about this. Thank you, Mr. Eastburn.

MS. ZWISLER: Good morning, your Honor.

THE COURT: Good morning.

MS. ZWISLER: My name is Margaret Zwisler, I'm [14] representing F. Schumacher & Company.

THE COURT: Right.

MS. ZWISLER: I'm somewhat at a disadvantage in rebutting some of these discussions, your Honor, because we haven't been served with any of the papers —

THE COURT: Sure.

MS. ZWISLER: — so I haven't read the motion to exclude me.

THE COURT: Right.

MS. ZWISLER: So, I'm kind of shooting at the dark, but if you'll bear with me, I'll tell you a couple of things that I think are relevant to why we should be here.

THE COURT: Okay.

MS. ZWISLER: I certainly agree with you that it's an extraordinary remedy to close the courtroom to the defendant.

THE COURT: Yeah, you're preaching to the converted on that.

MS. ZWISLER: We have an interest in this, this is not a dispute solely among the plaintiffs in the sense that we filed a motion in support of the plaintiffs' motion to enforce the settlement. We want to settle the case, we believe we can contribute as a matter of fact, should that become relevant to a — to the resolution of the question of whether there's circumstantial evidence, if that is relevant — and I agree with Mr. Eastburn, it may not be — if whether there's circumstantial [15] evidence of the way that American Blind has conducted itself through the course of the last year constitutes a separation from the other plaintiffs, because a lot of what I understand has been presented here, has to do with the communications between American Blind and F. Schumacher & Company and its counsel. So, we believe that both, we have an interest and

that we can present facts, again, if it's relevant, on the issue of the circumstantial evidence surrounding this agreement.

But our principal reason for believing that we should not be excluded, in addition to the due-process issues, are that there has been a waiver of the attorney/client privilege issues in this case, as soon as American Blind put in issue questions as between what it said to its counsel, Ms. Zack, and, certainly, with respect to Ms. Resnick.

There's one thing to remember here, that's very important to this waiver issue, Mr. Eastburn and Mr. Karsch do not represent American Blind, they are in exactly the same position as I am with respect to American Blind and the other counsel that are here with F. Schumacher & Company. So, if we're going to have any discussion at all — and I believe this has already been waived, since they served Mr. Eastburn with a phone book with, alleged, attorney/client privilege communications. American Blind waived it when they gave it to Mr. Eastburn in support of this motion. Mr. Eastburn has zero attorney/client relationship with Mr. Katzman (phonetic).

[16] THE COURT: Okay.

MS. ZWISLER: So, if you want to exclude me, your Honor, you've got to exclude Mr. Eastburn and Mr. Karsch and I don't know how you can do that.

THE COUPT: Okay.

MS. ZWISLER: Thank you, your Honor.

THE COURT: I'm going to take a short recess.

Appendix H

MR. LAGESON: Your Honor —

THE COURT: Oh, excuse me. I'm sorry.

MR. LAGESON: I'm Rick Lageson.

THE COURT: Mr. Ripley.

MR. LAGESON: No, I'm Rick Lageson. I represent the other defendant, your Honor, the NDPA.

THE COURT: Oh, oh, I'm very sorry. I apologize for —

MR. LAGESON: That's fine.

THE COURT: And your name is?

MR. LAGESON: Rick Lageson from St. Louis.

THE COURT: Oh, okay. You are not on my list of counsel, which is —

MR. LAGESON: Well —

THE COURT: — that — which is why I ignored you.

MR. LAGESON: — if we can all stipulate —

THE COURT: Please —

MR. LAGESON: — maybe we can reach a stipulation, your Honor.

[17] THE COURT: Go ahead, go ahead.

MR. LAGESON: Your Honor, I'm here today because I interpreted your order calling for the parties to be present in person with someone who has an evaluation of the case and ready to discuss settlement, that's why I am here today, in addition —

THE COURT: I entered such an order?

MR. LAGESON: Yes, yes, your Honor.

MR. EASTBURN: No, you — it's a form I sent, your Honor —

MR. LAGESON: Yeah.

MR. EASTBURN: — scheduling it.

THE COURT: Oh, okay. Gee, I wish —

MR. LAGESON: And it talked about sanctions and —

THE COURT: — I wish you'd called. I could have save you a trip.

MR. LAGESON: Well, perhaps. Your Honor, the defendant NDPA is not a party to whatever this settlement agreement was. I am — like Ms. Zwisler — shooting in the dark, but perhaps more than Ms. Zwisler shooting in the dark, because I have not even seen the settlement agreement.

Appendix H

The only concern I have on behalf of the defendant, NDPA, your Honor, is a comment that was made by a counsel for American Blind at the hearing before Magistrate Leomporra, to the effect that the defendants were engaged in some divide and conquer strategy. I have no problem agreeing to not participate [18] in this hearing, your Honor, if counsel to the plaintiffs are willing to state that they are not accusing or suggesting that my clients engaged in any improper actions during these settlement discussions.

THE COURT: Why don't you stop right there. Any such contention on your part?

MR. REICH: Your Honor, with all due respect, I don't — I'm not aware of any conduct by his clients during the settlement negotiations.

THE COURT: So, therefore, you're not making such a contention?

MR. REICH: As to his client and he, as far as I'm concerned, he joins in my motion to seal the court, he's agreed to do that. And — I mean, I'm prepared to do that. If I could also reiterate one other point.

THE COURT: Now, wait a minute, let me handle this point first.

MR. REICH: Yeah.

THE COURT: He's going to walk out of here, if he gets an assurance that neither Mr. Eastburn or you are making the kind of contention that he just referred to.

MR. REICH: I said, no, your Honor.

THE COURT: Are you making such a contention?

MR. REICH: No, your Honor, not as —

THE COURT: Mr. Eastburn?

[19] MR. EASTBURN: No, your Honor.

THE COURT: Does that satisfy you, sir?

MR. LAGESON: Yes, your Honor, that being said, we have no objection to being excluded from these proceedings and if your Honor —

THE COURT: Okay. You're welcome to —

MR. LAGESON: — is — if your Honor is releasing me from — my interpretation of this order, there would be no further need for us to stay around.

THE COURT: Okay. I'm certainly releasing — now, where are you from again?

MR. LAGESON: St. Louis, your Honor.

THE COURT: St. Louis, okay. What firm?

MR. LAGESON: Yes. Zulthouse and Walsh (phonetic), a firm in St. Louis.

COUNSEL: We gave them Dick Vermeil, so, you know, they've got to —

MR. LAGESON: That's right.

THE COURT: Do you know Judge Linbaugh (phonetic), do you?

MR. LAGESON: Yes, I do, your Honor, one of my partners clerked for him for several years.

THE COURT: Yeah. Well, a dear fried from the Codes of Conduct committee. All right. I'm going to —

MR. REICH: Your Honor, may I make one comment?

[20] THE COURT: Yeah.

MR. REICH: Yeah. There was a suggestion made that counsel for Schumacher and Mr. Eastburn sat in the same position as it relates to this matter. There is a very fundamental difference and that is, as your Honor knows, co-plaintiffs' counsel or co-defendants' share a common privilege and the fact that he may not be representing American Blind — Mr. Eastburn's not representing American Blind — doesn't mean that he's not part of the common privilege and the protection and they sit in a very different position than Schumacher and its counsel. Thank you.

THE COURT: All right. Thank you.

I'm going to take a recess. Thank you, sir, and I'm sorry —

MR. LAGESON: Thank you, your Honor.

THE COURT: — again, for having overlooked you. All right.

Appendix H

(Brief recess.)

(Resumed in open court.)

THE COURT: All right. Please, everybody, sit down.

Counsel, obviously, this is a very intriguing and significant point and I am loathed — if it's so important — I'm loathed to decide it today without further help from you, which I'm afraid means that we'll have to bring you back a second time. But let me just think aloud with you in a minute [21] — for a moment.

It seems to me that the filing of the affidavit under seal waived the privilege as to Mr. Eastburn, although Mr. Eastburn's clients, presumably, already know the facts because of the joint participation. My tentative conclusion is that it would be unfair to hold that American Blind waived the privilege as to the defendant, because they filed that affidavit in reliance on my sealed order.

So, I guess, the first question I need briefed is, was the filing of the — I'm going to assume it was in reliance on the sealed order, it seems to me clear that it was — and, therefore, was that a waiver with respect to defendant? As I say, my tentative conclusion is, no, but I'm prepared to be educated.

The second thing is the relevance of the contents of the affidavit and the proposed rebuttal testimony to the point that I'm called upon to decide, which is whether there is a binding settlement agreement. And the third point is, in what factual context has a trial court closed down a courtroom to a party and been either reversed or affirmed in doing that.

Now, those briefs, obviously — at least the American Blind's and Mr. Eastburn's briefs — will continue to be filed under seal. The defense, I'm well aware, you're shooting in the dark, but it's an extremely unusual situation. I'll bet in all your years of practice, Mr. Eastburn, you haven't run into one [22] like this, I certainly haven't, once?

MR. EASTBURN: This is the first.

THE COURT: Now, does anybody think that there's anything else that should be briefed. I guess, the other question is — and maybe you could address this and I don't know whether this is viable or not, I expect you will have a difference of opinion — on whether I properly could decide the point that's before me for a decision without considering either the affidavit or the rebuttal testimony. I suspect, Mr. Eastburn, your answer to that would be, yes —

MR. EASTBURN: Absolutely.

THE COURT: — and I expect Mr. Reich's answer would be, no.

MR. REICH: You're very insightful, your Honor.

THE COURT: Right. So, you two might want to brief that point as well.

Now, I'm sorry to, you know, make you come back and there are a lot of people here and — but this, obviously, is a very significant point. And let me just say this, it might be one however I decide it, that I — if it were appropriate — that I might be prepared to certify.

MR. REICH: Yes, your Honor, I do think it may be appropriate for that.

THE COURT: Because it's a — to me — a very difficult question. But let me — certification, obviously, [23] will depend upon my state of mind — my degree of comfort with what I decide, once I decide it, after getting your help.

Now, I don't want to set a briefing schedule. I would like you to agree on a briefing schedule, you're both — you're all busy lawyers and I understand that. I think given the history of this case, you've been through one trial, we ought to keep this moving as promptly as we can, but still, you're busy lawyers and I'm much more concerned about the quality and the helpfulness of what you give me, than — that's more important to me, than the speed with which you file it.

MR. REICH: Yes, your Honor.

THE COURT: So, I'll just ask you to work out a briefing schedule.

MR. REICH: And —

THE COURT: I expect to have the defendant's brief, as well and I would suppose there's no necessity for yours to be under seal, do you have any different view?

MS. ZWISLER: Your Honor, our settlement agreement is — our settlement agreement is confidential, the agreement itself and I don't — that's the only interest we have in maintaining confidentiality here. But — so I doubt that our brief needs to be under seal, since none of the issues that you identified relate to that issue.

THE COURT: Well, when you submit your brief, give me a letter a day ahead of time and say, I'm going to submit this [24] brief, I ask you to put it under seal or I don't ask you to put it under seal and then I'll know.

MS. ZWISLER: Thank you, your Honor.

THE COURT: If you ask me, at least for the time being, just as I've done for them, I will, of course, do it.

MS. ZWISLER: Thank you, your Honor.

MR. REICH: Your Honor —

MR. EASTBURN: Your Honor, there's one other tricky little nuance here and that is to the extent that the Resnick affidavit might refer to negotiations with Schumacher, it seems to me that Schumacher should have the right to at least know those parts of the affidavit, so that they can address them.

MR. REICH: Your Honor, I strenuously disagree with Mr. Eastburn, who I have a great of affection for, but I think he really is off on — off base on this one, because as I've argued before, it's you know, to pierce or parse the correspondence to try to find the line that may reference Schumacher, in my judgment, would be impractical, it would be —

THE COURT: Well, suppose the affidavit says, on February 2nd, I had a telephone conference with counsel for Schumacher. Now, there's no way that's privileged.

MR. REICH: No, it isn't, your Honor, and —

THE COURT: Now, if there are such things in the affidavit, what I would suggest, Mr. Eastburn, is that at your [25] convenience, you review the affidavit and cite me to any such portions that you think are not privileged, vis-a-vis, Schumacher.

MR. EASTBURN: Be happy to.

MR. REICH: I mean, if we could agree on that and if we —

THE COURT: You might be able to agree on it, sure.

MR. REICH: Yeah, I mean, if — if he would identify those issues that he thinks are not privileged, I would be glad to agree to it.

THE COURT: Take a look at them and see what you think and then —

MR. REICH: Right.

THE COURT: — if there's an agreement, we'll supply them and if there isn't an agreement, then I'll look at it and decide.

MR. REICH: Yes, your Honor. And is it contemplated — which I assume — that this would be simultaneous filings, whatever the date is, whether it's thirty days from — as opposed to responsive —

THE COURT: I think — I think simultaneous filings would be less helpful to me.

MR. REICH: Okay.

THE COURT: Don't you think — in other words —

MR. EASTBURN: Absolutely.

[26] THE COURT: — I ought to have — whoever wants to take the leading oar in this.

MR. REICH: I mean, we will be glad, your Honor, since we're asking for the sealing of the record, we will be the moving party and we would, however, respectfully request the opportunity to file a reply brief.

MR. EASTBURN: I'd have no problem with that.

THE COURT: Okay.

MR. REICH: Great.

THE COURT: Sure, you'll have a reply brief.

MR. REICH: And we'll — and we'll work out a schedule.

THE COURT: Work out a schedule and whatever you decide, it's all right with me.

MR. REICH: Great. Thank you very much, your Honor.

THE COURT: Well, the only thing I can say about this is, it'll give me the pleasure of seeing you all again.

MR. REICH: Thank you very much, your Honor.

THE COURT: A couple of old friends in this courtroom.

MR. LAGESON: Your Honor, one other point —

THE COURT: Yes.

MR. LAGESON: — if I may raise one other point —

THE COURT: Sure.

MR. LAGESON: — in light of the briefing —

THE COURT: I thought you'd gone home?

[27] MR. LAGESON: I want to, your Honor.

In light of the briefing schedule, I'd remind your Honor that you've also directed that the case is set for trial March 24, if —

THE COURT: Obviously, if the briefing — I don't — what I didn't want to do, I did that at my own instance.

MR. LAGESON: Right.

THE COURT: I didn't want everybody to have to prepare — spend their client's money preparing for trial, while they didn't know whether they were really going to trial and I will protect you in that. What we will simply have to do is, if this — don't feel under that gun, when you're setting your schedule.

Let's get this out of the way and maybe we'll all — if we try it, we nay all be here — I caution you — this summer, okay.

MR. LAGESON: Thank you, your Honor.

THE COURT: All right. Be sure you say hello to Judge Limbaugh for me.

MR. LAGESON: Will do.

THE COURT: All right. Counsel, good morning.

ALL COUNSEL: Thank you, your Honor.

(Adjourned in this matter at 10:50 a.m.)

* * *

APPENDIX I — REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE TO THE DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED JANUARY 10, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 90-3617

ALVORD-POLK, INC. ET AL.,

Plaintiffs

v.

F. SCHUMACHER & CO. and THE NATIONAL DECORATING PRODUCTS ASSOCIATION, INC.,

Defendants

REPORT AND RECOMMENDATION

JUDGE TULLIO GENE LEOMPORRA, U.S.M.J.

DATED: JANUARY 9, 1997

This matter has been referred to me for the purpose of a hearing and recommendation on the application of the plaintiffs to enforce a settlement entered into by a majority of the plaintiffs against one plaintiff who refuses to accept the terms of the settlement.

A brief history is in order. The plaintiffs, including the dissenting plaintiff, American Blind and Wallpaper Factory,

Inc., entered into an agreement among themselves to institute an action against the defendants. The plaintiffs are customers of the defendant F. Schumacher & Co. which manufactures and sells wallpaper products of superior quality and design. A dispute arose over the restrictions imposed over the plaintiffs for the purchase of the products of the defendant. Without going into detail, defendant would sell only certain products in its quality line to those plaintiffs who then resold the products through their 800 number. The plaintiffs wished to handle all the Schumacher lines including the two top lines, which defendant reserved for decorators and stores with retail shops.

Since the parties could not reach any agreement, plaintiffs sued in federal court where it was tried before Judge Daniel H. Huyett 3d and a jury for seven to eight weeks. The jury, after considerable deliberation, could not reach a verdict, thus necessitating a new trial. The case was referred to Judge Thomas N. O'Neill, Jr. for that purpose.

To further their purposes, the plaintiffs entered into a Litigation Committee Agreement (referred to as the "Agreement") on May 24, 1990. This Agreement describes the protocol which would control the procedures and management of the case.

After the trial, the matter was referred to me to discuss settlement or other matters before commencing a new trial.

My first conference was an all day affair with all counsel, as well as the parties, in Allentown, Pennsylvania, on July 29, 1996. Some progress was made, but with so many parties no agreement was reached. Subsequently, I held another settlement conference in Reading, Pennsylvania, on September 24, 1996. Again, the parties and counsel were present. The issues were

again discussed into the afternoon and, when it was apparent that no settlement could take place with so many interests, I concluded the conference.

However, before I left the bench, counsel for plaintiffs, Attorney Joanne Zack, asked if she and the plaintiffs could meet with me again, privately in the jury room. I was then informed that the majority of the plaintiffs had voted to settle. A dispute arose and plaintiff American Blind refused to join in the settlement. All the other parties voted to settle. I was asked to rule on the terms of the Litigation Committee Agreement but, since I had not read it, I declined to do so.

At this point, the critical paragraph of the agreement is paragraph 5:

> 5. From time to time during the course of the Litigation, the Committee will be asked to make decisions regarding the governance of the Litigation. Such decisions shall be made by a majority vote of the representatives of all of the Committee members, and shall be final, conclusive and binding on all members of the Committee. All members of the Committee will be given advance notice of any votes. In the event of a tie vote, the proposal will be deemed to be rejected.

Agreement at 3-4. Also significant is paragraph 11:

> 11. Where a settlement proposal is tendered by one or more defendants to all signatories as a group, the group shall vote on that proposal using the procedure set forth in Paragraph 5 of this Agreement.

Agreement at 6.

Appendix I

On the basis of the above, I held an argument in Reading, Pennsylvania, on December 17, 1996, on the meaning of the terms. At argument, plaintiff American Blind was represented by Attorneys Abraham Reich and Stephanie Resnick. The other plaintiffs were represented by Attorney William H. Eastburn, III, who had replaced Attorney Zack who felt there was now a conflict of interest in her representation.

Having set the preliminaries, I heard argument and conclude that the terms of the Agreement prevail and are binding on American Blind as well as the other plaintiffs. The principal argument of American Blind that it was no longer bound by the agreement is not convincing. American Blind argued that at various times during prior negotiations, it withdrew from the Committee and intended to pursue its own interest in the litigation. Various letters were cited as encouraging American Blind to remain with the group and it did so. Every indication showed that American Blind participated at the trial and at the negotiations as a plaintiff, but it states it withdrew. Factually, this argument fails because American Blind did nothing officially to withdraw. In fact, Attorney Resnick, in a letter dated August 7, 1996 to Michael Lando, stated: "Finally, please note that if a group offer is tendered which is not acceptable to ABWF, it may simply 'opt out' pursuant to paragraph 6." Defendant F. Schumacher & Co., by counsel, Attorney Margaret M. Zwisler, agreed that the offer was still open.

s/ Tullio Gene Lemoporra
TULLIO GENE LEOMPORRA
United States Magistrate Judge

APPENDIX J — TRANSCRIPT OF PROCEEDINGS DATED DECEMBER 17, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action
90-3617

11:00 a.m.
December 17, 1996
Reading, PA

ALVORD-POLK, INC. ET AL.,

Plaintiffs

vs.

F. SCHUMACHER & CO.,

Defendant

and

NATIONAL DECORATING PRODUCTS ASSOCIATION (NDPA),

Defendant

Before Magistrate Judge TULLIO GENE LEOMPORRA

* * *

Appendix J

[3] PROCEEDINGS

THE COURT: Please sit down.

To Mr. Reich, good to see you again.

MR. REICH: Good to see you, your Honor.

THE COURT: Now, this is Alvord-Polk, Inc., et al. versus F. Schumacher & Company. This matter came before me maybe a month or so ago for settlement purposes. It was originally tried before Judge Huyett in this building for a period of, I think it was three weeks, is that right?

MR. EASTBURN: About six weeks.

THE COURT: Six weeks. And the jury was unable to reach a verdict. I was asked to, if I could confer with these people, the parties to see if I could help them settle their case. At the time I had a matter in Allentown. We had a conference there in the courthouse in Allentown, which was more or less successful. At least we were talking about settlement.

Subsequently, I set another conference here, and in that conference, I was not making too much progress it appeared to me. It wasn't settling. And I said in front of the bench here, I have done all that I can do about this here. And someone asked me to see me in the back room, which is the jury room for those who have not been here before. And I was told that the majority of the people were — majority of the plaintiff's were willing to settle the [4] case. A figure had been given some time ago, and they were willing to accept the figure.

Well, with that statement, there was an old common law expression, the argument was hoisted on its own petard. And here we are, what appeared to be a settlement is now a dispute.

I have reviewed the settlement agreement and I have reviewed paragraph 5 which more or less controls —

MR. REICH: Excuse me, your Honor —

THE COURT: — what is supposed to be done.

MR. REICH: With all due respect, I don't mean to interrupt you, but these proceedings, pursuant to Judge O'Neill's order, were ordered to be sealed and that no papers were to be served on the defendants in the courtroom today, our representative of the defendants. And to the extent any discussion or argument would touch upon those matters that are in fact sealed by Judge O'Neill, we would ask that the defendants and the representatives be excluded from the courtroom. And the only reason I stood at this point —

THE COURT: I will deny that for the time being because I don't know what the purpose of that order was. I saw Judge O'Neill yesterday, and I don't know what the purpose of that order is. But I'm saying the preliminaries for those who don't know them —

[5] MR. REICH: But my position has been stated, your Honor, and I again would object to their presence because the matter is sealed, and the agreement itself was to be confidential. Thank you.

THE COURT: We'll get to that in a few minutes.

Now, I was at where?

MR. KARSCH: Paragraph 5, your Honor.

THE COURT: Paragraph 5 spells out how the settlement can be reached by the plaintiffs. And in that paragraph 5, the terms of how the majority rules, apparently the majority wanted to settle this case. I say apparently because that's what they all told me here except for the plaintiff, Mr. — your clients, Mr. Reich.

MR. REICH: Yes, your Honor.

MS. RESNICK: American Blind.

THE COURT: Because there was not agreement there, they asked me to rule on it, and I refused to rule on it at that time because I hadn't seen the agreement, so we continued it.

Now, since that time, I received a lot of papers and I want to know from different lawyers where we are on this.

For instance, Ms. Zwisler.

MS. ZWISLER: Yes, your Honor. Good morning.

THE COURT: Good morning. Is your agreement, as [6] far as you're concerned, is your offer still there?

MS. ZWISLER: Your Honor, we have executed a settlement agreement, and we have transferred funds into an

escrow account pursuant to the settlement agreement. I believe you have our papers among those submitted.

THE COURT: All right. The settlement agreement, who were the parties?

MS. ZWISLER: All eight plaintiffs have signed the settlement agreement. My client, F. Schumacher, has signed the settlement agreement and has discharged obligations under that agreement already. These obligations are contingent upon a finding by a not — final, not appealable order your Honor, that American Blind is bound by the terms of this other agreement to settle the case.

THE COURT: Mr. Eastburn, they're your clients now, aren't they?

MR. EASTBURN: The eight of the nine are.

THE COURT: And they did sign?

MR. EASTBURN: Absolutely. And I do have before the court the settlement agreement, the releases, the escrow agreements, and the representation that was just made is correct.

THE COURT: All right. What happened since that time, Mr. Reich?

MR. REICH: Your Honor, and again I will speak [7] briefly because this matter is under seal, but it has been our position for well over a year that that agreement is not binding on our client, American Blind.

THE COURT: Now, you have to tell me why because that is what I want to know.

MR. REICH: Your Honor, again I will reiterate, with the defendants present, I believe that it would be inappropriate for me to go into the substance of the arguments which are before your Honor, both in terms of the brief and the appendix which has before it the record which demonstrates in my view why American Blind is not bound by that agreement, your Honor.

THE COURT: All right. Up until the other parties accepted the agreement in this room, here in the back (indicating), was American Blind part of that?

MR. REICH: Absolutely not, your Honor.

THE COURT: All right. Did American Blind sign the original agreement with the other plaintiffs as to how to proceed in this case, or to proceed in this case?

MR. REICH: Your Honor, if you're referring to the agreement that is an appendix to the filings in this case, your Honor, the answer is yes.

THE COURT: Let me see. Which are the appendix?

MR. REICH: Well, in our — it's exhibit B to the Katzman affidavit, your Honor.

[8] THE COURT: Is that paragraph 5?

MR. REICH: There is a paragraph 5 there, your Honor.

Appendix J

THE COURT: All right. Now —

MS. ZACK: Judge Lemoporra, may I make one statement, please. Joanne Zack, and I was trial counsel for all nine plaintiffs.

Your Honor, since we don't know how you will rule on this matter, and some of the issues that I believe will be raised by both sides do involve matters of attorney-client privilege, and there is a possibility that privilege would extend to the future, and if you ruled contrary to a settlement, I would join Mr. Reich in a request that the defendants not be privy to that part of the discussion as to matters privileged between plaintiffs and their attorneys. Thank you, your Honor.

THE COURT: All right.

Now, let's do as much of this as I can do without you all standing up and objecting to it. Because I want to make some progress here, and I want to understand where we are before I can say how we will proceed in the future, if we will.

We discussed this agreement partially, the parties did in this jury room (indicating), and I'm familiar with it. I have read it. And I want to concentrate on that for [9] the time being. If there needs to — if there is anything confidential, then I'll have to just take those parties who are alleging the confidentiality and they will have to tell me about it privately.

MR. REICH: Your Honor, if I could just for the record, the agreement that you're referring to in paragraph 19 specifically says that the existence of the agreement and the terms and conditions shall remain strictly confidential. In

addition, the order of November 26, 1996 said, and I quote, "and either defendant shall have access to the documents filed under seal with the Clerk of Court pursuant to this order."

Again, your Honor, I would be pleased to stand. I apologize for sitting, but would you prefer that we stand when we address you?

THE COURT: No, I can handle that.

MR. REICH: Again, just for the record, and I appreciate your wanting to get through this, but from our standpoint, it would be inappropriate to argue the matter, and we will rest on our papers, if that's your pleasure, with the defendants present.

THE COURT: This was sent to me for report of recommendation on the agreement. And I address you to tell you that because that's what I'm supposed to be doing.

MR. REICH: Yes, your Honor.

[10] THE COURT: And I'm supposed to give a report and recommendation to the district judge as to how to proceed or what I think of it, since I was involved with it. Now, if none of you want to tell me anything, I guess I can't write such a report and recommendation. I will just write from what I already know.

MR. REICH: Your Honor, with all due respect, we have filed an extensive brief and appendix of some length. We are prepared to go through that in as much depth as the court would like, but I'm not willing to do it with the defendants present. I will rest on our papers because I think we have said it. I'm willing to address any questions the courts have as long as I

don't have to violate the confidentiality. Because I agree with Ms. Zack, I think it hinges on attorney-client privilege. This is a dispute exclusively between and among the plaintiffs.

THE COURT: Well, Schumacher is a party that is going to pay. I wanted her to be here because I want to know whether she is still going to pay. If she is not, this is a waste of time.

MR. REICH: Well, particularly as you heard her comment, she would only pay if my client American Blind is bound by this and all appeals have been filed. Again, your Honor, with all due respect, we are prepared to go into as much as detail orally today but not in the presence of the [11] defendants.

MR. EASTBURN: May it please the court, I think there may be a way around this entire issue. If we were to look for a minute at the four corners of the agreement, particularly the confidentiality section, paragraph 19, your Honor. And I would just quote, and it says, "except by order of the court."

So, if you order us to proceed to discuss the agreement, it seems to me that's covered in the agreement.

MR. REICH: Your Honor, with all due respect, there is a notion known as law of the case, and Judge O'Neill has already ruled on that issue at Mr. Eastburn's request. I think it is inappropriate for your Honor to order that the thing be unsealed now, but you are the judge and I respect whatever you say.

THE COURT: I don't know whether — I mean I know what the agreement is. I have read it myself. So, there is nothing secret about it. I heard their discussion in the other room, and I was sitting there.

MR. REICH: Your Honor, Schumacher was not present at that discussion. Clearly, among the plaintiffs in the court it is not a secret agreement, but it is as it relates to the defendant. It can only, as witnessed by the proceedings to date, impinge upon the rights of the plaintiffs in this case, and particularly American Blind, [12] because what they have attempted to do is divide and conquer.

THE COURT: Who has done that?

MR. REICH: The defendant — defendants, your Honor. And I believe it would be inappropriate for them to be privy to the interworkings of the relationship between and among the defendants, plaintiffs and their counsel —

MS. ZWISLER: Your Honor, with all due respect on this issue, Mr. Reich wasn't present on September 24th. The existence and the terms of that committee agreement relating to the mechanism, the procedure of settlement were disclosed in this courtroom by representatives of the plaintiffs. I was sitting there (indicating). And it was said in open court — we did not have a reporter on that day — that the paragraphs of the committee agreement governed. The majority of the plaintiffs had voted to accept our settlement offer. The plain language of the agreement governed that vote. And based upon that and in reliance upon our understanding of what was disclosed by counsel for plaintiffs, we went forward, signed the settlement agreement and have transferred funds.

It is our position, first, that whatever confidentiality provision attends to that paragraph 19 was waived in this courtroom by those people that are now trying to assert it, number 1. Number 2, the purpose for Judge [13] O'Neill's order,

as I understand it, was to address the plaintiffs' concerns that there are substantial provisions in the committee agreement supposedly that are irrelevant to a determination of this matter which is before your Honor this morning. The two paragraphs that you are supposed to be construing, 5 and 11, the terms have basically been disclosed to us, and I fail to see that the plaintiffs have the ability or the standing to insist on confidentiality, having waived it themselves.

Finally, sir —

MR. REICH: Your Honor —

MS. ZWISLER: I am not finished.

Finally, we do have an interest in this case, in this proceeding, not just this case. We have got a big interest in this case. We have got an interest in the outcome of this proceeding. And you can tell that we do by what Mr. Reich just said to you, which is that we are trying to divide and conquer, we have done something, either wrong or illegal or whatever it is that he is going to say that is going to adversely affect the interest of his client.

Therefore, based upon these three issues, your Honor, I respectfully request that we be permitted to be present. We don't have any business people here. We have counsel. We will maintain the confidentiality of this among the counsel for the client, except where we have a [14] responsibility to communicate with senior management. But beyond that, your Honor, I don't think we have an issue.

MR. REICH: Your Honor, with all due respect, my client, American Blind, did not waive the confidentiality agreement, did not — We were not present when those alleged representations were made in this court, and have never waived the coindentiality.

THE COURT: Everybody was present.

MR. REICH: Well, with all due respect, Ms. Resnick was here, but at that time, Ms. Resnick and Mr. Katzman had already left the proceeding.

THE COURT: That is not so. She was standing in the back. She wasn't at counsel table. We had a thorough discussion in the back room.

MR. REICH: But not with the defendants present, your Honor. That is the distinction. They were not present. And moreover, having read the agreement, there are other provisions that are highly material to our client's position as to why it's not bound by the settlement, neither of which have been identified by Ms. Zwisler.

THE COURT: Are you going to bring those up?

MR. REICH: They're part of the record, your Honor.

THE COURT: All right. Well, part of the record is what I want to look at, too, number 5. And I am still [15] asking, how do you get around number 5?

MR. REICH: Your Honor, I would direct the court's attention to the brief we filed, with all due respect, and in

particular, we can start with the arguments we made beginning at page 13.

THE COURT: All right. Here. For instance, I'm reading number 5: "During the course of this litigation, the committee will be asked to make decisions regarding the goverance of this litigation. Such decision shall be made by a majority vote of the representatives of all of the committee members, and shall be final, conclusive and binding on all members of the committee, or all members of the committee will be given advance notice of any votes. In the event of a tie vote, the proposal will be deemed to have been rejected."

Now, can you go from there?

MR. REICH: Your Honor, I certainly can. And again, I would emphasize it talks about the goverance of the litigation, and I would take you to our brief beginning at page 13, the argument that goes from page 13 to page 16, the argument that goes from page 16 to page 22 —

THE COURT: Wait a minute. Now, what do you want me to read first, page 16?

MR. REICH: Your Honor, I don't expect you to read it at this very moment. What I'm suggesting to you is the [16] reasons why we are not bound by paragraph 5 are set forth in detail in the brief which we filed with this court, and the legal argument begins at page 13 and goes through page 30.

THE COURT: All right. Now, what you are saying to me is that up to the moment when the negotiations were concluded and the majority wanted to vote for settlement, your client was part of the agreement?

MR. REICH: No, it was not, your Honor.

THE COURT: It was not part of the agreement?

MR. REICH: Beginning a year before that, your Honor —

THE COURT: He was out of it?

MR. REICH: That's correct. And our position again is set forth in detail.

THE COURT: So, what was he doing here?

MR. REICH: Your Honor, he was still a party to the litigation. And again, without disclosing the confidences that existed among and between the plaintiffs and their counsel, it would be inappropriate for me to comment with the defendants here.

THE COURT: All right. I want to take a break for a minute and I want to see if I can get ahold of Judge O'Neill. You can stay in here.

MR. KARSCH: Can I just say that we disagree completely with Mr. Reich's position. And without [17] disclosing the terms of the agreement, that they could not have withdrawn from the agreement and still be a party to the lawsuit.

THE COURT: Well, nobody told me that they withdrew from the agreement. They were arguing in here. They were all arguing.

Your client, if I recall correctly, had some proposals for his own side.

MR. REICH: Your Honor, there is no question that my client was pursuing settlement of this dispute. There is no issue.

THE COURT: All right.

MR. REICH: But it was not under the terms of the agreement as your Honor has just alluded to.

THE COURT: How did he get out of the agreement?

MR. REICH: Your Honor, again I don't mean to be obtuse with you —

THE COURT: That's one you don't want to tell me about.

MR. REICH: Your Honor, with all due respect, it is set forth in detail in our brief, and the agreement itself is very explicit on the right to do it. Very explicit.

THE COURT: Okay. Maybe I ought to read that so that I can ask you some questions.

[18] MR. REICH: Your Honor, I will be pleased to answer any questions.

MR. EASTBURN: Your Honor, I think you also need to look at paragraph 6 since you have read obviously pretty carefully. And I'm talking about the agreement of 24 May, '90. I won't comment what it says, but I think it speaks for itself.

THE COURT: Well, that paragraph — let's say this: "Any member of the committee may choose to withdraw as a litigant." So, Mr. Reich's client may withdraw and leave the committee

at any time. "The monies contributed in the form of cash or irrevocable letter of credit, however, are not refundable. They will not be returned unless authorized by a majority vote of the remaining committee members."

Is there any dispute about that money?

MR. REICH: No, your Honor. That is the penalty that we would suffer for having withdrawn, your Honor.

THE COURT: Did you tell Mr. Reich what your client was saying when we were meeting in this jury room?

MS. RESNICK: Yes, your Honor.

THE COURT: Did you tell him the proposals that he was making?

MS. RESNICK: Yes, your Honor. But with all due respect, the proposals that were being made and bantered [19] about between Schumacher and American Blind have little relevance to the issue of whether ABWF is bound by the settlement agreement that has been reached between Schumacher and the eight other plaintiffs, which settlement we have from the beginning advised the parties that we were not a part of and our claims should not be included in it.

MR. KARSCH: Your Honor, since you have disclosed the terms of that paragraph, we believe that the key term of that paragraph is the word "litigant," and that American Blind has never withdrawn as a litigant.

MR. REICH: Again, your Honor, our brief has addressed that very point.

THE COURT: All right. Relax for a few minutes.

MR. REICH: Thank you, your Honor.

(At 11:45 a.m., there was a brief recess.)

[20] THE COURT: All right. I just spoke to Judge O'Neill, and he is willing to withdraw his order and instruct you to answer whatever it is that I ask you.

MR. REICH: Based on that representation, your Honor, I will follow the dictates of the court. My position has been stated, I believe, very clearly.

THE COURT: All right. And he said he would put on his robe and be glad to come down. And I mentioned that we were in Reading, and then he withdrew that.

All right. Now, again, where was the agreement, on exhibit B?

MR. REICH: Yes.

MR. EASTBURN: I have some extra copies if you want one.

THE COURT: I'm sure I have it here, but it has gotten out of hand. Thank you.

All right. Let's get back to paragraph 5. My question to you is, will you answer that? And will you answer it?

MR. REICH: Absolutely, your Honor. Any question you ask me, you have directed me, you have represented that Judge O'Neill has rescinded his order. I have made my position clear. And as I mentioned, and you have quoted from it, paragraph 6 gives any member of the committee the right to withdraw as a litigant and leave the committee at [21] any time.

THE COURT: Let's start with paragraph 5. Take one paragraph at a time. You can sit down.

Now, a decision to settle this case was made by what appeared to be a majority of the plaintiffs. You said —

MR. EASTBURN: Eight out of nine.

THE COURT: Pardon me?

MR. EASTBURN: Eight out of nine. And I have signed documents if you want to see them.

THE COURT: And the agreement says the majority rules. Now, you are saying what in answer to that?

MR. REICH: Your Honor, number one, my client as early as July of 1995 withdrew from the committee, as was its right pursuant to paragraph 6. And the evidence of that is reflected in the appendix which is filed with your Honor. And if it's helpful to you, I will be glad to identify every letter in the record which identifies the indications that it withdrew from the committee.

THE COURT: All right. What letters were they? What exhibits?

MR. REICH: Again, your Honor, I'm going to refer to them by number. And again we are looking at the Appendix of Exhibits of American Blind and Wallpaper in Support of Response in Opposition to Motion to Enforce Settlement which [22] was filed with the court. There is as exhibit 1 the affidavit of Steven Katzman, and attached to his affidavit —

THE COURT: I see this table of exhibits. Is that what you're reading from?

MR. REICH: Yes, your Honor, it's Appendix of Exhibits. It's the two-inch binder.

THE COURT: Which one of these letters says I withdraw?

MR. REICH: I'm going to go through them because it is more than one. If you go to exhibit C, to the Katzman affidavit, a letter dated July 17, 1995; if you go to the letter dated August 8, 1995 which is exhibit D, there are then, if you would go to the affidavit of Ms. Resnick, again exhibit B is a similar letter that I just identified; exhibit D which is the September 7th, 1995 letter; exhibit F which is a May 3rd, 1996 letter; exhibit I which is a July 26th, 1996 letter; exhibit O which is a August 23, 1996 letter; exhibit Q which is a letter dated September 4, 1996, which specifically acknowledges what our position has been; exhibit T which is a September 17th, 1996 letter; exhibit V which is an October 3, 1996 letter —

THE COURT: What is that?

MR. REICH: V, your Honor.

THE COURT: As in victory?

[23] MR. REICH: As in Victory.

THE COURT: Exhibit what?

MR. REICH: Exhibit V, an October 3rd, 1996 letter; exhibit W which is an October 8, 1996 letter; exhibit Z which is an October 17, 1996 letter, exhibit BB, like in boy, which is an October 10, 1996 letter; exhibit CC which is an October — or that maybe the same one, your Honor. I think — I'm sorry, it's exhibit CC, not BB which is the October 10, 1996 letter; exhibit EE which is an October 11th, 1996 letter; exhibit FF which is an October 14th, 1996 letter, exhibit JJ which is an October 24th, 1996 letter.

THE COURT: Now, these letters say what? I want out? Or I am out?

MR. REICH: That's a general characterization of them, but they reflect —

THE COURT: You characterize it.

MR. REICH: They reflect my client's withdrawal from the litigation committee agreement for settlement purposes.

THE COURT: And why all these letters?

MR. REICH: Because there was a period of time during which the parties agreed that they would try to participate in different tracts. There were certain amendments. And again, your Honor, they are reflected in [24] detail in the appendix and the brief, and I don't mean — I would refer the court to those in detail.

THE COURT: What amendments?

MR. REICH: There was a proposed, there was a proposed amendment at one point to try to settle it in two different tracts, but that was never consumated, your Honor. There was an attempt by my client over a period of a year not to prejudice the rights of the other plaintiffs, but to participate without prejudice in a way that would be constructive to a resolution of this dispute. Unfortunately, because of the turn of events, that was not possible. But it is clear as can be, based upon the letters I have referred to and the others in the appendix, that my clients intent was and was actually acted upon that intent to withdraw from the committee agreement.

MR. EASTBURN: May it please the court, I think this is a very simple issue. And I respectfully suggest that my eminent opposing counsel is rather confusing the issue. If you merely go to paragraph 6, your Honor, it says, second line, "withdraw as a litigant." And I respectfully suggest to you they have never withdrawn as a litigant in this litigation. And I think you need —

THE COURT: Have they continued to pay their fees?

MR. EASTBURN: They paid front end like everybody else did. Everybody put up equally in accordance with the [25] agreement. But it's very basic and very simple. Webster, which is maybe a guide to some of us, called a dictionary, says that a litigant is one who engages in a lawsuit. And that's what this whole document is all about, litigation, a litigant. And they're still in this lawsuit.

Now, they refer you to all kinds of documents, and the reason yesterday I faxed you a request that we have an

evidentiary hearing on a "phone book" that I got at ten of 5:00 on Friday afternoon — I didn't even see it until Monday — was because that's less than complete. And is less than in giving the court a candid view of what is really going on here. And I'll refer you to just one letter from Mr. — to Mr. Lando from Stephanie Resnick that they exclude from the phone book, and it says on the first page, last sentence: "We may simply opt out pursuant to paragraph #6." Dated August 7th, 1996.

Now, what does that tell you? It tells you at least as of August of 1996, they hadn't opted out. They were talking about they might opt out. It is right at the bottom of that page.

Now, how can you give the court a bundle of exhibits that represents in 1995 they're out when Counsel Resnick is still saying in 1996, we might opt out. The truth of the matter is they never opted out. They have never withdrawn from this litigation. They want to redefine [26] this agreement of 1990. There is a way to amend this agreement. They didn't amend it. It hasn't been amended. And, therefore, I respectfully suggest to you, if they want to withdraw as a litigant, they have to tell you that here and now. And then they will be out of the case. And there is another resolution after they do that. But I think they want their cake and eat it, too. And I think it's that basic.

MR. REICH: Your Honor, with all due respect to Mr. Eastburn —

THE COURT: I just — I'm having a problem now because I remember what American Blind said in the other room. And I'm not sure that I want to say it, but I would like to say it to Mr. Reich privately, and get his permission.

MR. EASTBURN: I have no objections to that, your Honor.

THE COURT: Will you step back in here?

MR. REICH: Yes, your Honor.

(The Court and Mr. Reich left the courtroom.)

THE COURT: Can I see Ms. Zwisler and Mr. Eastburn, please?

MR. REICH: Would you like me present?

THE COURT: No.

MR. EASTBURN: I didn't eavesdrop on you.

[27] (At 12:10 p.m., the Court and Attorneys Zwisler and Eastburn left the courtroom.)

(At 12:20, the proceedings continued as follows:)

THE COURT: All right. Is there anything else that anybody — what I tried to do, and I want to put this on the record is that I wanted to convey what I knew that happened at the end of the time when we learned that the majority wished to settle the case. And we were in the jury room and there was a lot of talking. And I wanted counsel to know what I heard and what was said. I also wanted counsel to understand that at the time there were some efforts to negotiate a further settlement with Mr. Reich's client. But that didn't work. And I have expressed my thought that maybe this has gone on because if that were

settled, that the problem would go away and everybody would be satisfied with the result. We don't have that. All right. So I will have to make a report and recommendation.

Is there anything else that anybody else wishes to say to me?

MR. REICH: The one point I would ask, I know you indicated in a conference with Judge O'Neill that he permitted us to discuss, at least address your argument and I was directed by the court to answer the questions and I did. I don't know whether it was the intent of Judge O'Neill to unseal the record. If in fact that was [28] expressed, we would like the opportunity to readdress that issue with the judge because we filed this appendix under the direction of sealing. It contains attorney-client privilege information, as Ms. Zack and Mr. Eastburn will both tell you. It would be in my judgment extremely detrimental to the position of American Blind if these attorney-client documents were turned over to the defendants in the context of them trying to negotiate a resolution of this. And so, to the extent it was conveyed to you that he was unsealing the record, and I don't know if that was made clear —

THE COURT: I think what he was saying is that you were required to answer my questions, and I don't know that it was a big unsealing.

MR. REICH: Well, as long as the sealing order remains in effect.

THE COURT: He may issue you another order. He said that.

MR. REICH: Well, then we'll address that. My concern is that we simply filed attorney-client privilege work product under seal with the assumption that it would be under seal. And to the extent that's going to be rescinded, we would like notice and an opportunity to be heard before the unsealing. Thank you.

THE COURT: And by the way, if you are sending [29] things to me, send them here, not to Philadelphia because I was — Yesterday I was in Philadelphia and I picked up something that you had faxed, I believe.

MR. REICH: And again, I would ask counsel for the other plaintiffs as well as the other plaintiffs' representatives not to make access to those filings unless there is a specific order of the court that allows then to do so.

And I take it, Mr. Eastburn, you will not share the matters that are under seal?

MR. EASTBURN: I have no intention of doing that.

MR. REICH: And the other representatives in the courtroom, is that correct?

THE COURT: They are not involved with the —

MR. REICH: Mr. Lando is also. He has been given access —

THE COURT: The other representatives were here when all of this discussion was going on. It's not a secret really.

MR. REICH: Your Honor, with all due respect, the exhibits are very detailed as to the negotiation strategy. I mean it would be in my judgment detrimental to my client's position to have the defendants have them.

THE COURT: All right.

MR. REICH: Thank you very much, your Honor.

[30] MR. EASTBURN: Your Honor, I did, in fact, fax you a letter yesterday. Because what happened procedurally, you extended their right to file through the 13th. Now, what in fact happened was at 4:50 Friday afternoon, I happened to be in a board meeting in Philadelphia. This (indicating) arrived by messenger to our office. The first time I had any access to this was Monday morning. Now, it has about 40 pages of affidavits, 29 pages by Counsel Resnick. And it has a lot of letters and arguments. If the court is — and I'm not saying this is necessarily relevant to the issue that you have to decide and recommend to Judge O'Neill. But if this is going to be considered, I would like the opportunity first, through an evidentiary hearing both in direct and cross-examination, and to respond to this, because I don't think this is fair play. I just don't think this — we don't try cases by ambush. Now, I tell you that receiving something like this on a Friday at the very end of the day is trial by ambush.

MR. REICH: Your Honor, with all due respect, that was never the intent. We were directed to file it on Friday. And I can tell you if they could have gotten it to them earlier — I came back from a meeting at 2:30 on Friday and Mr. Resnick and Mr. Jobes were still working on the papers. And to the extent he wants to reply to it, there has never been an intent to

deprive Mr. Eastburn and his [31] clients from replying. We have not sought to prevent that. And now, clearly, we think this is a very important issue. And it would have been a derogation of our duties to our client not to make a complete record, so this court and perhaps others would have that opportunity to review it completely.

MR. EASTBURN: And I'm glad Mr. Reich said a complete record, because all you have to do is look at the one letter we submitted to you today on August 7th, 1996 propounded by their firm to Mr. Lando. It shows you that its less than a complete record. And if it's going to be considered, that's why I respectfully would request the opportunity both for an evidentiary hearing and the right to respond to that.

THE COURT: Well, I have urged everybody here — this is a — it is going to go on and on. I can see that. And I don't know anybody is going to profit by it. But as I said before in this case, you can't be having a settlement, Mr. Reich. So if you can't get what you want, try something else.

MR. REICH: Your Honor, with all due respect —

THE COURT: And the same way on the other side, if you can't get it all, try something else.

MR. REICH: We have always been willing to try to resolve this matter and to negotiate a fair settlement.

[32] THE COURT: Well, your position hasn't changed since the beginning, since I have been involved.

MR. REICH: And as made clear, product is extremely important to the survival of my client. Witness what has happened to most of the other plaintiffs since the start of this litigation. They are out of business, your Honor.

THE COURT: I didn't know anything about that.

MR. REICH: It's in the papers that we —

MR. KARSCH: And witness what has happened to American Blind without Schumacher product. They have done very well.

MR. REICH: It would have done much better and sustained as reflected by the expert, damages in excess of 50 million dollars, your Honor.

MR. KARSCH: American Blind I meant to say. Sorry.

MR. REICH: Thank you, your Honor. We appreciate your time.

THE COURT: All right. Who is your client?

MR. REICH: Mr. Katzman.

THE COURT: Katzman. I think you should talk to him. You should talk to him and try to find another solution to this. I mean there has got to be another way to do this because otherwise you are going to be trying this [33] case all over again.

MR. REICH: Your Honor, unfortunately, we are prepared to try this case again if necessary. But we would be willing to try to find ways around it, as you point out, your Honor, but we will talk to him. Thank you.

THE COURT: Thank you.

(The conference was concluded.)

* * *

(2)

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No. 98-672

In The

Supreme Court of the United States

October Term, 1998

AMERICAN BLIND & WALLPAPER FACTORY, INC.,

Petitioner,

vs.

ALVORD-POLK, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the Third Circuit's Decision in this case was reached in an accepted and usual course of judicial proceedings as was the decision of the lower court such that there is no call for an exercise of this Court's supervisory power. The questions presented are:

> Whether the Petitioner ever requested an opportunity to present evidence at a hearing at the District Court level, or rather did the Petitioner rely on the written record it had previously submitted, and in fact oppose the presentation of testimonial evidence by the other plaintiffs.
>
> Whether the Petitioner waived its right to present testimony when it never requested to do so at the District Court level.
>
> Whether the consideration of any evidence was required in order to determine if the Petitioner was bound by the Settlement Agreement, and whether the evidence presented by the Petitioner was in fact considered by the District Court and considered to raise no genuine issue of material fact.
>
> Whether the Decision of the Court of Appeals is inconsistent with its prior decisions or the decisions of other circuits.

The Third Circuit's resolution of the above issues was proper and was consistent with its own decisions as well as with decisions in other circuits.

RULE 29.6 STATEMENT

Pursuant to Supreme Court rule 29.6, Respondents declare that none of them have any parent companies or any subsidiaries.

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STATEMENT OF THE CASE

A. The Plaintiffs' Agreement

Prior to instituting an antitrust suit against F. Schumacher & Co. ("Schumacher") and the National Decorating Products Association ("NDPA"), all of the plaintiffs entered into an agreement, namely the "Wallpaper Industry Litigation Committee Agreement" (the "Agreement") on May 24, 1990. CA App. 708-726. The Agreement delineated how the group would manage, direct and fund the litigation, act on settlement offers and make other decisions concerning the litigation. CA App. 708-726. It is this Agreement which the courts below were called on to interpret.

The Agreement provided that, although the businesses of the plaintiffs varied considerably in their annual gross sales, the plaintiffs nevertheless would fund the litigation on an equal basis with an initial contribution of $25,000 each, along with a promise to pay in the future equal shares of the expenses of the litigation and equal shares of the legal fees on an on-going basis. CA App. 708-726, ¶¶ 3 and 7. Concomitant therewith was a provision in the Agreement that provided for an equal distribution of any group settlement. CA App. 708-726, ¶ 12. However, at trial, each plaintiff was required to prove, and recover, its own damages. CA App. 708-726, ¶ 9.

Decisions with regard to the litigation were to be made by a majority vote of the members. CA App. 708-726, ¶ 5. However, any modifications to the terms of the Agreement required unanimous consent. CA App.

708-726, ¶ 16. Although Paragraph 5 required advance notice of voting, no time period was specified.

In the event a settlement proposal were tendered to the group as a whole, the Agreement required the group to vote on the proposal using the majority vote provision of Paragraph 5. CA App. 708-726, ¶ 11. The Agreement did not prevent any plaintiff from negotiating its own settlement with any defendant. CA App. 708-726, ¶ 10.

The Agreement also provided for a mechanism for leaving the committee. CA App. 708-726, ¶ 6. That could occur if a party entered into a settlement with all the defendants, ¶ 10, or if it chose to "withdraw as a litigant". ¶ 6. The central issue determined by the courts below was the meaning of the term "withdraw as a litigant".

B. Petitioner's Purported Withdrawal from the Group

Petitioner asserts that on July 17, 1995, it "withdrew from the litigation for purposes of settlement only." In fact, however, on July 17, 1995, Petitioner wrote to the plaintiffs' law firm ("Kohn firm") that it had "elected to withdraw as a litigant and member of the Committee" unless Paragraphs 11 and 12 of the Agreement were amended. Neither the letter nor the Agreement says anything about withdrawing "for purposes of settlement only." CA App. 277-278.

Thereafter, although the Agreement was not amended, Petitioner continued in the case as a plaintiff and as a member of the Committee. Indeed, in September

1995, Petitioner participated in a Committee vote concerning group settlement procedures. CA App. 280. Petitioner conceded that the two-group settlement procedure did not amend the Agreement. CA App. 240. Thus, on July 17, 1995, Petitioner merely threatened to "withdraw as a litigant and member of the Committee," and then did not act on the threat.

From late April 1996 until late June, 1996, a trial was held in this case in which Petitioner participated as a plaintiff. CA App. 590. Because the jury hung and was unable to reach a verdict, a mistrial was declared. CA App. 590. On June 11, 1996, during the course of the trial, all parties including Petitioner participated in a settlement conference before Judge Huyett. CA App. 054, 242.

Thereafter, on July 29, 1996, an all-day settlement conference was held before Magistrate Judge Leomporra. CA App. 590.

On August 7, 1996, Petitioner's individual counsel Fox, Rothschild wrote to the Kohn firm asserting that if certain events occurred, Petitioner "may simply 'opt out' pursuant to Paragraph 6 [of the Litigation Agreement]." CA App. 753-754. Petitioner did not assert on August 7, 1996 that it had previously, on July 17, 1995 "withdrawn as a litigant for settlement purposes only." Instead, on August 7, 1996, Petitioner stated that it might "opt out" in the future.

The next letter sent by Petitioner's counsel, on August 23, 1996, similarly does not state that Petitioner had "withdrawn for purposes of settlement only." Instead, the letter states that Petitioner has "withdrawn from the plaintiff group effective immediately." CA App.

318-320. Notwithstanding this assertion, Petitioner continued as a plaintiff in the case, representing to Magistrate Leomporra on December 17, 1996 and to Judge O'Neill on February 13, 1997 that it was still a plaintiff and still represented by the Kohn firm. CA App. 672, 771, 775.

It was not until after August 23, 1996 that Petitioner first asserted the position that it had allegedly "withdrawn for the purposes of settlement only." CA App. 326. Contrary to Petitioner's suggestion, the other eight plaintiffs clearly did not acquiesce in this position. On the contrary, the first document even mentioning Petitioner's position that it had "withdrawn for purposes of settlement only" is a September 4, 1996 letter from the Kohn firm to Petitioner's separate counsel. That same letter states clearly that "Petitioner understands that all other plaintiffs reserve any and all rights." CA App. 326. Thus, far from agreeing that Petitioner had "withdrawn for purposes of settlement only", the other plaintiffs expressly reserved all rights.

C. The Vote on the Settlement Proposal

On August 20, 1996, Magistrate Judge Leomporra notified the parties that he had scheduled a settlement conference for August 29, 1996. CA App. 322.

On August 22, 1996, Schumacher tendered a written group settlement offer to the Kohn firm. CA App. 308-310. On that same day, Harold Kohn forwarded the offer to all plaintiffs indicating that a vote was now appropriate under the Agreement and putting all plaintiffs on notice that a meeting among plaintiffs, including

a vote on the settlement offer, was scheduled for August 26, 1996. CA App. 312-313. The short notice period was required because of the impending settlement conference. CA App. 322.

On August 23, 1996, Petitioner wrote to Mr. Kohn, complained about the short notice period and demanded that the meeting and voting be canceled unless certain conditions were met. CA App. 318-320. Meanwhile, the settlement conference was postponed until September 24, 1996 because of unavailability of counsel. CA App. 322, 103.

On September 24, 1996, principals and attorneys of all plaintiffs and of Schumacher attended a settlement conference before Magistrate Judge Leomporra. CA App. 253-254. After extensive settlement discussions, including private discussions between Petitioner and Schumacher in front of Magistrate Judge Leomporra, Petitioner and Schumacher were not able to reach a settlement. CA App. 254, 469-470. The reason for the impasse was that Petitioner continued to refuse to settle unless it could sell all of Schumacher's product lines and Schumacher refused to agree to that. CA App. 469-470. Petitioner has never wavered from its position that it will settle only if it is authorized by Schumacher to sell all of its lines, including the high-end lines. CA App. 209, 243 (¶ 8), 296-297, 338-340, 496-497. In fact, Petitioner has repeatedly acknowledged that it was not interested in a monetary settlement and that it would give up any monetary settlement in order to obtain access to all of Schumacher's product lines. CA App. 209. Schumacher has never wavered from its position that it would not authorize its 1-800 dealers to sell its high-end product lines through

their 1-800 accounts. CA App. 242-243, ¶¶ 20-21; 247-248, ¶ 33; 250-251, ¶ 42.

Thereafter, all plaintiffs met with Magistrate Judge Leomporra privately, at which time some of the plaintiffs called for a vote on the Schumacher proposal. CA App. 255. Petitioner refused to participate in the vote and left the room. CA App. 255. The other plaintiffs voted unanimously to accept the Schumacher proposal. CA App. 256.

The formal Settlement Agreement was executed by Schumacher and all of the plaintiffs except Petitioner as of November 18, 1996. CA App. 595-634.

ARGUMENT

I. THE COURTS BELOW CORRECTLY CONCLUDED THAT THE AGREEMENT IS CLEAR ON ITS FACE, AND THAT "WITHDRAW AS A LITIGANT" IS CAPABLE OF ONLY ONE MEANING, NAMELY, TO WITHDRAW COMPLETELY FROM THE LITIGATION.

On May 24, 1990, plaintiffs entered into an Agreement among themselves which described how they would manage, direct, and fund their antitrust litigation. CA App. 708-726. As set forth above, they agreed to divide the costs and the settlement proceeds equally. Each was responsible for proving its own damages at trial. Decisions would be made by a majority vote. The relevant provisions of the Agreement are as follows:

> 5. From time to time during the course of the Litigation, the Committee will be asked to make decisions regarding the governance

of the Litigation. Such decisions shall be made by a majority vote of the representatives of all of the Committee members, and shall be final, conclusive and binding on all members of the Committee. All members of the Committee will be given advance notice of any votes. . . .

6. Any member of the Committee may choose to withdraw as a litigant, and leave the Committee, at any time. The monies contributed, whether in the form of cash or irrevocable letter of credit, however, are not refundable and will not be returned unless authorized by a majority vote of the remaining Committee members.

* * *

10. Each signatory is free to enter into separate settlement agreements with one or more of the defendants. When a signatory settles separately with all defendants, that settlement shall be deemed a withdrawal within the meaning of Paragraph 6 of this Agreement.

11. Where a settlement proposal is tendered by one or more defendants to all signatories as a group, the group shall vote on that proposal using the procedure set forth in Paragraph 5 of this Agreement.

* * *

16. This Agreement shall not be amended or modified except by a written amendment executed by a duly authorized representative of each of the signatories. . . .
CA App. 708-726.

The simple question the courts below were asked to decide was the interpretation of the term in the Agreement, "withdraw as a litigant". Petitioner contended with

a complete absence of sound reasoning that it meant to withdraw from the group for the purpose of pursuing a separate settlement. The settling plaintiffs contended that it meant what it said, to withdraw as a litigant, and the courts below agreed.

In this particular case, the term "withdraw as a litigant" is capable of one and only one meaning. As the District Court correctly noted, a litigant is "a party to a lawsuit; one engaged in litigation. . . . " Black's Law Dictionary (rev. 4th ed.). The District Court correctly analyzed the crucial Paragraph as follows:

> [P]aragraph 6 does not authorize withdrawal from the committee for a limited purpose, but rather allows a signatory to "withdraw as a litigant, and leave the committee, at any time" and thus permits signatories to withdraw from the committee *only when also withdrawing from the litigation*. ABWF remains engaged in this litigation and thus has not withdrawn as a litigant. Therefore, ABWF has not withdrawn within the meaning of paragraph 6.
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> Petitioner's App. 24a (footnotes omitted)(emphasis added).

II. THE COURTS BELOW CORRECTLY CONCLUDED THAT PETITIONER'S EVIDENCE, EVEN IF CONSIDERED, IS NOT PERSUASIVE WITH REGARD TO ANY ISSUE RAISED BY PETITIONER.

Petitioner claims in the alternative in its Petition that the substantial evidence submitted by it was not considered by the District Court. This statement is patently incorrect. The District Court alternatively considered

Petitioner's evidence but ruled that it raised no genuine issue of material fact. The Court's decision in this regard is consistent with summary judgment standards, which require the non-moving party to come forward with evidence which shows the existence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

In fact, the District Court considered Petitioner's evidence in a light most favorable to Petitioner because the settling plaintiffs had not had the opportunity to present evidence to refute that of Petitioner, with the exception of Ms. Resnick's opt-out letter of August 7, 1996, which was submitted to Magistrate Judge Leomporra at the hearing on December 23, 1996. CA App. 657-689. The Memorandum and Order of the District Court notes:

> The exhibits offered by ABWF, even if considered, reveal only ABWF's unilateral attempts to withdraw from a binding group settlement vote while remaining in the litigation and to revoke the committee's counsel's authority to negotiate on behalf of the full committee. The unambiguous language of the agreement forecloses such actions. The exhibits do not reveal any other party's acquiescence in ABWF's position but reveal only that the committee continued to seek ABWF's involvement in group settlement efforts without prejudice either to ABWF's position or to the other plaintiffs' rights under the Agreement. *See* Ex. 2Q.
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> Petitioner's App. 27a, footnote 8.

Petitioner's claim that the lower courts refused to consider Petitioner's evidence regarding lack of notice is simply untrue. The District Court notes, "[t]he exhibits

also reveal that Petitioner was notified a vote was imminent and was present when the vote was called." Petitioner's App. 27a, footnote 8. See also Section III of the Opinion of the Court of Appeals, Petitioner's App. 11a.

III. NO EVIDENTIARY HEARING WAS REQUIRED.

Petitioner argues that an evidentiary hearing was required pursuant to the holdings in *Tiernan v. Devoe*, 923 F.2d 1024 (3d Cir. 1991) and *Garabedian v. All State Engineering Company*, 811 F.2d 802 (3d Cir. 1987).

The issue in *Garabedian*, supra, was whether a client had authorized his attorney to settle his case on the terms set forth in a proposed Settlement Agreement. Affidavits were submitted by the parties, and the Court resolved the dispute without holding a hearing, relying solely on the Affidavits and Memoranda. The Court of Appeals stated that when relief from a Judgment hinges upon a factual issue, and credibility determinations are involved, a hearing should be held to determine entitlement to relief. Since the Affidavits of the client and his attorney demonstrated the existence of a genuine dispute of material fact, the Court should have held a hearing. In the instant case, there is no genuine dispute of material fact. The only issue is whether or not the terms of the Litigation Agreement are ambiguous. Both Courts below found that the terms of the Litigation Agreement were not ambiguous and there was no genuine dispute of material fact.

The *Tiernan* opinion, supra, cites *Garabedian*, supra. In *Tiernan*, there were disputed factual issues concerning an attorney's authority to enter into settlements on behalf of his clients, whether those clients had actually ratified the

settlements and whether those clients were equitably estopped from challenging the validity of the settlements. It was for those reasons that the Summary Judgment entered by the District Court was reversed. Again, in the instant case, there are no genuine issues of material facts.

Both *Tiernan* and *Garabedian* stand for the proposition that an attorney cannot settle a claim without the authority of his client. They are inapplicable here. The issue in the instant case is not whether Petitioner did or did not authorize the Kohn firm to settle on its behalf. Rather, the real issue and the threshold question is whether Petitioner is bound by the terms of the Litigation Agreement. If the Agreement does not permit Petitioner to withdraw for the limited purpose of settlement, then the issue of whether Petitioner could have withheld authority to settle from its attorney is moot. This is so because Petitioner cannot be permitted to do indirectly that which it cannot do directly, namely, avoid the majority vote provision of the Agreement.

Furthermore, *Tiernan* and *Garabedian* are not pertinent to this issue in that the cases cited therein deal specifically with enforcement of settlements. The Agreement under review here is not a settlement agreement. It is merely a contract entered into by plaintiffs setting forth the rights and obligations plaintiffs would have with respect to each other throughout the course of the entire litigation.

IV. PETITIONER OBJECTED TO THE PRESENTATION OF TESTIMONY BEFORE THE DISTRICT COURT, NEVER REQUESTED THE OPPORTUNITY TO PRESENT TESTIMONY BEFORE THE DISTRICT COURT, AND HAS WAIVED ANY CLAIM WITH REGARD TO ITS HAVING BEEN DENIED THE OPPORTUNITY TO PRESENT TESTIMONY BEFORE THE DISTRICT COURT.

The main thrust of the Petition for a Writ of Certiorari is that Petitioner was denied the opportunity to present testimony before the District Court. This is a rather specious argument inasmuch as Petitioner not only never requested the opportunity to present testimony before the District Court, but repeatedly objected to the presentation of any testimony before the District Court.

At the hearing before the Honorable Thomas M. O'Neill, Jr. on February 13, 1997, Petitioner's counsel stated:

> Number 2, you are here to review the issue de novo and will – as our opponents, co-plaintiffs, in this case – have requested – want to put on testimony, which despite our objection, Your Honor has granted and they wish to put on testimony and –
>
> Petitioner's App. 34a.

Petitioner's counsel went on to state:

> Your Honor, our objection at least as to putting on testimony, had less to do with whether it was relevant, but there was a procedure put in place that allowed them the opportunity to submit

> affidavits, as we did or to submit supplemental materials, which we did not object to. . . .
>
> Petitioner's App. 34a.

Although the Petition includes representations with regard to witnesses the Petitioner was prepared to present at the hearing on February 13, 1997 and the testimony they would offer, all of which is unsupported by the record, at no time during the hearing on February 13, 1997 did the Petitioner request of the Court the opportunity to present any testimony, nor did it advise the Court that it had witnesses who were present in the court room who were prepared to testify.[1] Moreover, in neither of the Petitioner's Memoranda filed pursuant to Judge O'Neill's directive on February 13, 1997, did the Petitioner claim that it had requested the right to present testimony or that it had been prejudiced by not being allowed to present testimony.[2] CA App. 793, 843. This issue was first raised before the Court of Appeals.

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[1] Likewise, Petitioner makes the bald assertion on page 4 of its Petition "Accordingly, by July, 1995, a year before the first trial, it became apparent to all Plaintiffs that the provisions in the Litigation Agreement governing a group vote for purposes of settlement were no longer fair or appropriate." This is an outright misrepresentation supported nowhere in the voluminous record submitted by the Petitioner.

[2] Petitioner fails to mention that the briefing schedule also included the question of whether the Court could decide the issue before it without considering Petitioner's affidavit or the other plaintiffs' proposed rebuttal testimony. Petitioner's App. 50a.

Significantly, in Petitioner's Supplemental Memorandum of Law dated April 1, 1997, CA App. 793-825, Petitioner states:

> Further, by letters dated January 31, 1997 and February 6, 1997, counsel for the other eight plaintiffs has requested the opportunity to present testimony, including the testimony of Joanne Zack, Esquire, trial attorney for all plaintiffs (including ABWF). ABWF has objected to this request and believes that the other eight plaintiffs had ample opportunity to supplement the record, and chose not to, before the Magistrate Judge issued his report and recommendation on January 9, 1997. (Footnote omitted).

CA App. 822.

Further contradicting the Petitioner's spurious argument that a hearing was necessary in order to have prevented a "grave and manifest injustice", Petitioner's counsel stated at the proceedings before Magistrate Judge Tulio Jean Leomporra on December 17, 1996 that it considered the appendix which it had submitted to that Court to have been a complete record. Petitioner's App. 87a.

Even if additional testimony had been germane to the issues before the Court, which it was not, Petitioner waived any right it had to present such testimony by objecting to the presentation of testimony when requested by the other eight plaintiffs, by failing to request of the District Court that it have an opportunity to present such testimony and by failing to preserve that issue before the District Court.

Petitioner argues that there were at least seven issues of material fact which should have been resolved at a hearing. However, to the extent that those issues were material, which both Courts below deemed were not, they were in fact considered by the Courts below on the basis of Petitioner's uncontroverted voluminous appendix of exhibits, found at CA App. 197-537. Based upon Petitioner's representation that it had submitted a complete record and there was no need for any testimony to be presented, Petitioner had a full opportunity of having its evidence, to the extent relevant, considered by the Courts below.

The Courts below properly concluded that there was no genuine issue of material fact since it was clear, even considering the uncontradicted evidence, that the Petitioner, still being a litigant, was bound by the Litigation Agreement and bound by the vote to accept the settlement which it acknowledged took place on September 24, 1996.

V. THE JUDGMENT OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ITS PRIOR DECISIONS OR THOSE OF OTHER CIRCUITS.

The judgment of the Court of Appeals does not conflict with the law of the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and DC Circuits. Those Courts, as has the Third Circuit, have all held that the summary enforcement of a Settlement Agreement by a district court is inappropriate when there are genuine issues of material fact. However, the District Court below found that in this

case there were no genuine issues of material fact. It stated:

> Under the unambiguous language of the Agreement, as long as ABWF remains a litigant, which it does to this day, it is bound by the terms of the Agreement including the provisions that bind it to the results of the majority vote on a group settlement proposal. FN7. Because the Agreement does not permit ABWF to withdraw from the group settlement vote while remaining a litigant, I need not consider the extrinsic evidence which ABWF contends demonstrates its intent to do so or the evidence proffered to refute ABWF's extrinsic evidence. FN8.
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> - - - - -
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> FN7. This Court must enforce the terms of the agreement as written and must not substitute its own judgment as to the terms that would yield the most equitable result. See *Steuart v. McChesney*, 444 A.2d 659, 663 (Pa. 1982).
>
> FN8. The exhibits offered by ABWF, even if considered, reveal only ABWF's unilateral attempts to withdraw from a binding group settlement vote while remaining in the litigation and to revoke the committee's counsel's authority to negotiate on behalf of the full committee. The unambiguous language of the agreement forecloses such actions. The exhibits do not reveal any other party's acquiescence in ABWF's position but reveal only that the committee continued to seek ABWF's involvement in group settlement efforts without prejudice either to ABWF's position or to the other plaintiffs' rights under the Agreement. *See* Ex. 2Q.
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> Petitioner's App. 26a-27a.

Clearly, the District Court did not summarily enforce a Settlement Agreement where there were genuine issues of material fact. Furthermore, none of the evidence submitted by the Petitioner was contradicted by any affidavit or evidence presented by the other eight plaintiffs. The only evidence presented by the other eight plaintiffs was one letter authored by Petitioner's counsel. There were, therefore, no disputed issues, genuine or otherwise, of material fact.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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